IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO. D-10-007

PARTY REQUESTING HEARING (Petitioner)	[redacted], Father
STUDENT	[redacted]
ADVOCATE FOR PARENT & STUDENT	[redacted]
LOCAL EDUCATIONAL AUTHORITY (LEA) (Respondent)	[redacted] County Schools
ATTORNEY FOR LEA	[redacted]
METHOD OF TRANSCRIPTION	Court Reporter
TYPE OF HEARING	Closed to the Public
STUDENT PRESENT AT HEARING	Appeared briefly before the commencement of the second day of hearing
HEARING OFFICER	Janet A. Sheehan, Esq. 41 - 15th Street Wheeling, WV 26003
WITNESSES CALLED ON BEHALF OF THE PETITIONER	[redacted] Parent [redacted] Parent [redacted] Grade Special Education Teacher with [redacted] County Schools [redacted] Supervisory Aide with [redacted] County Schools, during part of Student's 4th and 5th Grade years [redacted], 4th Grade Regular Education Teacher for [redacted] County Schools

[redacted], Supervisory Aide for [redacted] County Schools during Student's 5th Grade year

[redacted], Supervisory Aide for [redacted] County Schools during Student's 5th Grade year

[redacted], Homebound Instruction Teacher for [redacted] County Schools during Student's 5th Grade year

[redacted], Regular Education 5th Grade Teacher with [redacted] County Schools

[redacted], Assistant Principal, [redacted] County Schools

[redacted], Substitute Aide for [redacted] County Schools during Student's 4th Grade year

[redacted], Special Education Teacher for [redacted] County Schools during Student's 5th Grade year

[redacted], Special Education Teacher for [redacted] County Schools

[redacted], Special Education 6th Grade Teacher for [redacted] County Schools

[redacted], Special Education 6th Grade Teacher for [redacted] County Schools

[redacted], Supervisory Aide for [redacted] County Schools during Student's 6th Grade year

[redacted], Occupational Therapist under contract with [redacted] County Schools

[redacted], Assistant Principal (6th Grade) for [redacted] County Schools

[redacted], School Psychologist under contract with [redacted] County Schools

[redacted], Special Education Director [redacted] County Schools

[redacted], Special Education Teacher [redacted] County Schools

[redacted], Special Education Specialist [redacted] County Schools

WITNESSES CALLED ON BEHALF OF THE RESPONDENT

[redacted]
Principal for [redacted]
County Schools, during Student's 5th Grade Year

[redacted], Speech/Language Pathologist [redacted] County Schools

[redacted], Principal, [redacted] County Schools during Student's 6th Grade year

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4	April 20, 2008 – Positive Behavioral Support Plan with best practices for behavior disorders in the classroom attached (3 pgs.)
5	April 15, 2008 – IEP with Team Meeting Notes (11 pgs.)
6	April 28, 2008 – Student Progress Report (4 pgs.)
7	March - June 2009 – Home Instruction Notes and Financial Reports (9pgs.)
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9	October 30, 2008 – IEP meeting notes recommending one-half day placement if work is completed and dismissal from OT (1 pg.)
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11	March 31, 2009 – Notice of EC/IEP Team Meeting and April 7, 2009 – IEP Meeting Notes (10 pgs.)
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13	September 9, 2009 – Behavior Intervention Plan (2 pgs.)
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16	October 30. 2009 – Psychological Assessment by Mary Pat Kesecker (7 pgs.)

17	October 26, 2009 – First Notice of EC/IEP Team Meeting and November 4, 2009, Second Notice of EC/IEP Team Meeting (2 pgs.)
18	November 17, 2009 – Prior Written Notice of District's Proposal to continue Special Ed. Services under Other Health Impairment (1 pg.)
19	November 17, 2009 – Eligibility Committee Report (1 pg.)
20	November 3, 2009 – Request for Functional behavior assessment (FBA) and Outpatient Therapy (OT) Evaluation plus post meeting action notes (4 pgs.)
21	November 6, 2009 – Doctor's Note to complete OT evaluation (1 pg.)
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33	January 14, 2010 – Student Suspension Record with October 16, 2009 – December 11, 2009 Notes (7 pgs.)
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36	December 11, 2009 – Tests, work completed, examples of work assigned (13 pgs.)
37	Time-Out slips, class behavior positive prompts, recess behavior positive prompts, self-assessment behavior chart (12 pgs.)

38	November - December 2009 – Dailey Journal (13 pgs.)
39	Example of Student's recent work (2 pgs.)
40	4th Grade Observation Reports, school and parents (110 pgs.)
41	5th Grade Behavior Reports (85 pgs.)
42	April 15, 2008 - April 2009 - OT goals from April 15, 2008, IEP (2 pgs.)
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44	December 2009 – OT – IEP Meeting consultation (1 pg.)

I. ISSUES PRESENTED

The issues as stated prior to hearing were:

1. Whether student has been denied a FAPE [Free Appropriate Public Education] as a consequence of the school district's frequent removal of the student from his classroom, including times he was suspended from school, sent home early from school, and times he was placed into a homebound education setting?
2. Whether student's rights to a Free Appropriate Public Education (FAPE) were denied by the school district's failure to provide appropriate staff for student's instruction, sometimes providing aides instead of a qualified teacher, and sometimes sending student home because of insufficient staff?
3. Whether student's rights to a FAPE were denied when the results and recommendations of the most recent occupational therapy evaluation were not incorporated into the student's last IEP?
4. Whether an appropriate Functional Behavioral Assessment has been completed for student, and whether appropriate behavioral interventions have been implemented for student, as requested by the Parents?
5. Whether student's current IEP, which requires "consistent adult supervision," is adequate or whether student requires a "on-on-one aide" to be written into the IEP as requested by student's Parents?
6. Whether student has been denied a FAPE because of the school district's failure to provide Applied Behavioral Analysis (ABA) services to him?

7. Whether student has received services in the least restrictive environment as mandated by the IDEA?

I. PROCEDURAL HISTORY

The request for due process was filed with the West Virginia Department of Education on December 22, 2009, and this hearing officer was contacted and appointed that same day.

Pre-hearing telephone conferences were held between the hearing officer and the parties' representatives on January 12, 2010, on January 18, 2010, and on January 22, 2010.

At the January 12, 2010, conference it was disclosed that the parties had participated in a resolution session the previous day, without reaching an agreement. Mediation was suggested on behalf of the school but the Parents declined to participate. Hearing dates were established for January 26, 27 and 28, 2010. Matters concerning document disclosures (*i.e.*, discovery) and the deadline for exchange of evidence under IDEA's five day rule (34 C.F.R. §300.512(a)(3)) were discussed. Post-hearing briefs were set to be due, by agreement of both parties on February 12, 2010. The status of the resolution period was not made clear during the telephone conference so I requested the parties indicate to me in writing the status of their resolution efforts. That same day counsel for the Local Educational Authority (hereafter "LEA") submitted a letter via facsimile transmission explaining that a resolution session had been held, but that no agreement had been reached. After examining that disclosure in light of 34 CFR §300.510(c), regarding early termination of the resolution session, I determined that the mandated pre-conditions for early resolution termination did not exist here. Therefore the 30 day resolution period would continue to January 21, 2010, and the final decision would be due 45 days later, on March 8, 2010.

A second telephone conference was held on January 18, 2010, to resolve three pending motions. The first, dated January 14, 2010, was a motion in limine from the Respondent to restrict

the Petitioner's issues at hearing, specifically with regard to assertions concerning provision of a Functional Behavioral Assessment, and provision of an aide. The motion was based on allegations in documents filed by the Petitioner which were apparently inconsistent with the claims for relief in the complaint. Extensive discussion was held concerning the issues for hearing, to clarify what issues the Petitioner wanted to be heard, and to craft those issues into hearable form, while making certain that the allegations were consistent with the original complaint filed on December 22, 2010.

During the discussion it was clear to me that substantial factual questions were raised by the Petitioner's allegations and issues, and that further evidence was needed to resolve them. It was determined that the issues were consistent with claims in the original complaint, and that they were not resolved by the Petitioner's statements in the January 13, 2009, revised issue submission. Consequently, the Respondent's Motion In Limine to bar those issues at hearing was denied. The Order expressly noted Respondent's on-going right to object to any evidence offered at hearing which "they believe to be improperly offered." That Order was entered on January 19, 2009.

A second motion was filed by the Petitioner dated January 18, 2010, requesting a continuance to "allow for clarification of issues" and also to obtain certain documents which it was asserted had not been received from the LEA, or which had been received in illegible condition.

A third motion by the Petitioner requested that "evidence prior to December 22, 2007, be included in the due process hearing." The two motions of the Petitioner were together, in essence, a single motion for continuance to obtain additional discovery documents, in the form of educational records from the Respondent's administrative offices." The Hearing Officer indicated to the parties that although issues were subject to a two year statute of limitations, the parents had a right under IDEA to obtain any of the student's school records, and that they might be admissible, even if more than two years old, if they were relevant to a claim which arose within two years of the complaint.

A blanket ruling on admission of documents move than two years of age, was not possible at that time, but would have to be dealt with at hearing to determine if they document was relevant to a timely brought issue.

Petitioner's Advocate indicated that a list of the desired documents could be provided to Respondent, via facsimile transmission by early the next morning. Respondent's counsel stated they could have the requested documents available by close of business that same day, January 19, 2010, and that if any requested documents were not to be provided they would explain in writing why they were not produced.

Further, because both parties strongly desired to have the hearing as quickly as possible, they jointly agreed to disclose and exchange their evidentiary materials by January 21, 2010, and also, voluntarily both agreed to waive the five day exclusionary rule at hearing with regard to any evidence identified by the January 21, 2010, date. By means of this agreement it became possible to permit Petitioners the additional discovery they requested with a minimum of impact on the hearing date. Petitioner's motion for continuance was granted but the hearing date was moved back just one day to January 27, 2010. The due date for entry of the decision was unchanged at that time. Documents were exchanged by the parties by January 21, 2010.

A third brief telephone conference was held on January 22, 2010, at which the delivery of discovery materials and exchange of evidence were verified, and it was determined that the hearing could go forward. No problems were mentioned by the parties nor were any motions filed.

The hearing was commenced on January 27, 2010, and held in a neutral location in the parties' home county (i.e. the County Courthouse). The hearing was conducted over four hearing days; January 27, 28, 29 and February 2, 2010. Twenty-one witnesses were produced for the Petitioner's case including both of Student's Parents. The LEA called an additional 3 witnesses.

The Petitioners offered 30 total documents, including one rebuttal document, into evidence. With the exception of Petitioner's document Number 30, submitted as rebuttal to testimony, both Petitioner's documents and Respondent's documents were offered cumulatively at the opening of the hearing, and provisionally received, subject to possible later objection at hearing. Petitioner's exhibits originally numbered 5 and 19 through 25, were subsequently excluded on sustained objections by the Respondent. Petitioner's Exhibit 5 was incorrectly provided, and the document Petitioner intended to submit had not been provided to Respondent before the hearing. It was excluded after Respondent objected pursuant to the 5-day rule. Petitioner's document numbers 19-24 were professional/educational or psychological articles for which there was no expert foundation offered. These were excluded after objection by the Respondent on the grounds of relevancy. Exhibit 25 of the Petitioner was also excluded under the 5 Day Evidence Rule. Therefore Petitioner has 22 total exhibit documents in the record, but the highest numbered of them is No. 30. Respondent's offered a total of 45 exhibits, numbered 1 through 44, plus one designated "A."

A court reporter was present for the entirety of the four hearing dates. A volume of transcribed testimony was produced for each day and provided to both parties' representatives.

During the second day of hearing, Petitioner's Advocate alluded in her questioning to discovery documents she did not receive in discovery, (Transcript 2, Page(s) 16, Lines 2-3, hereafter "Tr.", "pp", " L"), and the witness likewise alluded to documents not included in the record because they were dated more than two years before the filing of the complaint. (Tr. 2, pp 18, L 7-10, and pp 20, L 10-18). Discussion was held on the record between the Hearing Officer, Petitioner's Advocate and Respondent's Attorney. Tr. 2, pp 18-39. Ultimately, after reviewing my file and determining that the Order granting Petitioner's Motion for Continuance (entered January 19, 2010) which concerned a telephone conference held on January 18, 2010, with both representatives

participating had set January 19, 2010, as the deadline for making discovery requests and January 21, 2010, as the deadline for exchange of documents. These short timelines were set at the request of the parties.

My file revealed no timely filed motion or other correspondence from the Petitioner indicating an y failure of the Respondent to provide requested documents, neither were the Petitioner's document requests on January 19, 2010, ever filed with me. Consequently, I ruled that January 21, 2010, was the deadline for making any motions concerning discovery and that requests made at hearing were not timely. (Tr. 2, pp 39, L 14-22). The hearing proceeded with the documents already admitted. One rebuttal document, Petitioner's Exhibit 30, was admitted on the fourth day of hearing over the Respondent's objection that Respondent's Exhibits 33 and 34 already addressed the same material. No objection was offered under the 5 Day Evidence Rule. The document was admitted to evidence. (Tr. 4, pp 8-12).

At the conclusion of the hearing, Petitioner's Advocate inquired when transcripts could be available. On learning that it would be 10 days wait, she made formal motion, on the record, for an extension of time from February 12, 2010 to February 24, 2010, in order to permit the submission of post-hearing briefs prepared with access to the transcript.

The parties were informed that such an extension of time for the briefs would necessitate an extension of the decision due date. Petitioner's Advocate indicated her understanding, and when asked if he had any objection, Respondent's counsel indicated he did not. The deadline for issuance of the decision was consequently extended nine days to March 17, 2010. A written order documenting this continuance was entered February 23, 2010. Post-hearing briefs submitted were timely received from both parties and their contents were considered in the writing of this opinion.

II. PRELIMINARY STATEMENT

Evidence in this case consists of 22 exhibits from the Petitioner, 44 exhibits of the Respondent, and testimony from 24 witnesses during four days of hearing. Many of the documents of the petitioner are duplicated or overlap with documents submitted by the Respondent, but since the parties generally referred to their own documents during the course of the hearing and since efficient use of timelines did not permit detailed comparison of exhibit documents during the hearing, some of which consisted of over one hundred separate pages, the entirety of both parties' documents were accepted into evidence.

Documents and Witness testimony cited and relied upon in the Findings of Fact have been found to be credible, reliable, relevant and material.

To the extent that other evidence supports the same points, it is cumulative. To the extent that evidence or testimony conflicts with that relied upon, it is not credited.

III. FINDINGS OF FACT

General Findings

1. Born in June 1998, Student is a boy eleven years and seven months old at the time of hearing. Respondents Exhibit 14 (hereinafter in the form of Res. Ex. 14).

2. Student is age-appropriately placed in the Sixth Grade, in one of the respondents' middle schools for the 2009-2010 academic year. (Res. Ex. 14).

He also matriculated normally from the Fourth Grade in 2007-2008, and to the Fifth Grade in the 2008-2009 academic year, while he was in elementary school. (Res. Ex's. 5 and Petitioner's Exhibit 4 (hereinafter in the form of Pet. Ex. 4)).

3. Student was originally identified as an eligible exceptional student in October 2005, when he was determined to have a speech language impairment. (Res. Ex. A. at pg 1 of 4).

Approximately one year later in October 2006, Student was again evaluated and determined to be eligible for special education with "other health impaired" (OHI) identified as the primary area of exceptionality. (Res. Ex. A. at pg 3 of 4). Eligibility under the OHI designation was again determined on November 16, 2009. (Res. Ex. 18).

4. The Local Education authority has been aware since at least January 11, 2007 that Student had been diagnosed with Asberger's Syndrome. (Pet. Ex. 29, at pg 1 of 6). (Note: the date on the cover of this document reads "06," but the stamped date on succeeding pages and the student's stated age, together indicate the document's true date must be January 11, 2007). School personnel are also aware that Student has Attention Deficit Hyperactivity Disorder, an anxiety disorder and depression. (Tr. 3, p 96). He is eligible for Special Education as a student with a primary eligibility classification of Other Health Impaired. (Res. Ex. 3, 19).

5. Student had an Occupational Therapy (O.T.) Evaluation in January 2007 and was found to qualify for educationally based O.T. services. (Pet. Ex. 29, at p. 5 of 6). O.T. services were provided for him prior to April 15, 2008, which is the earliest Individualized Education Program (IEP) admitted to evidence. (Res. Ex. 5). Prior to April 2008, Student had been working with the therapist, to use an Alpha smart device to type write, and to practice cursive. (Res. Ex. 5, p 3 of 11). O.T. services were provided for 30 minutes per week. (Res. Ex. 5, p. 7 of 11). O.T. Services were discontinued on 10/30/08 (Res. Ex. 9).

6. At least as early as his Fourth Grade year, Student had been a disruptive element in the classroom. He had also committed aggressive acts toward attending adults which caused them to make a safe room available to him. (Res. Ex. 5, p. 3 of 11).

Under the April 15, 2008 IEP, the earliest IEP admitted to evidence, Student was placed in a general education environment (GEE) for all but the 30 minutes per week he was given O.T. services. (Res. Ex. 5, p 7 of 11).

7. In the IEP of April 15, 2008, it is noted that Student is to have "Constant/consistent adult [supervision]". . . "across all settings." (Res. Ex. 5, p 7 of 11).

This notation is repeated in the next full revision of his IEP on April 7, 2009. (Res. Ex. 11, p. 6 of 10).

8. In the IEP prepared for his 6th Grade year, dated May 29, 2009, it is noted that he will be given "Behavior Management adult assistance," (Res. Ex. 12, p. 7 of 12), which provision is repeated in the next complete IEP revision of October 1, 2009. (Res. Ex. 14, p 6 of 11). In the May 29, 2009 IEP, Student is designated to be in a special education environment for 630 minutes (10.5 hours) per week. (Res. Ex. 12, p 7 of 12). The October 1, 2009 IEP places him in a special education setting for 840 minutes (14 hrs) per week. (Res. Ex. 14, p 6 of 11). Science is the only class indicated as occurring in a general education setting. It is, in fact, a special education/general education collaborative inclusive setting. Testimony of Special Education Social Studies Teacher (Tr. 3 at pp 104, 107).

9. Student has, in fact, had an aid available to him for most of his school time hours since the Fourth Grade conduct problems. (4th Grade: Tr. 1 p 140–141; Tr, 2 pp 61–62, 111–112). (Res. Ex. 31). (5th Grade: Tr. 2 p 204, 111-112, 291, 184). (6th Grade: Tr. 3 pp 100, 206). In the Sixth Grade his aide delivered instruction designed by and under the direction of the teacher. (Tr. 3, pp 199, 214).

10. Student's misbehaviors include extreme classroom disruptions and aggressive, violent behavior to property and staff members. These conduct problems have been occurring since at least

the Fourth Grade and are continuing. Safe room accommodations have been used. When he is anxious he makes inappropriate vocalizations and will not keep his seat, sometimes moving around the room or crawling on the floor. (Res. Ex. 5, p 3 of 11, Res. Ex. 11, p 4 of 10, Res. Ex. 12, p 4 of 12).

In spite of steps taken to manage Student's behavior and interventions used, Student has received some type of classroom suspension ten times in the past three years, two of them in the 2007-08 year (4th Grade), two in the 2008-09 year (5th Grade), and six in the 2009-2010 year (6th Grade) which is only half over. (Res. Ex. 33, p 1 of 7).

Safe Room

11. Safe room accommodations for Student were made as early as his 4th Grade year and are mentioned in an IEP as having been used prior to April 15, 2008. (Res. Ex. 5, p 3). Also Testimony of 4th Grade Special Education Teacher. (Tr. 2, p 94).

According to that teacher, the safe room was used primarily "when there were episodes when he was being loud, making noises, or acting out in other ways." (Tr. 2, p 95, L 8-10).

12. The use of the safe room as an instructional space to be used on a scheduled basis was established in an IEP meeting on September 26, 2008, during Student's 5th Grade year. (Res. Ex. 8, p. 2-3, Pet. Ex. 1, p. 12-13). This document amended the IEP of April 15, 2008 (Res. Ex. 5, Pet. Ex. 1). Although the September 26, 2008 meeting notes bear the date April 26, 2008, they are in fact from September 26, 2008 as evidenced by a faint correction above the date which reads "(should be 9/26/08)" and the references within those notes to a letter submitted to the team by the Parent which also is dated September 26, 2008. (*See* Pet. Ex. 1, p 15-16). As of the September 26, 2008 meeting, Student was to be in the safe room from 8:00 - 11:00 a.m. daily. (Res. Ex. 8, pp 2-3).

While there, he was to have an aide read him a social story and review his schedule for the day. He was to work in his safe room until 11:00. Only then was he permitted to join his classroom. (Res. Ex. 8, p. 2).

13. During the 6th Grade year, Student had several options available to him on those occasions when he had to leave his classroom due to disruptions. He could go to a designated safe room which was close to the gym. He could go to the ALC room which was off the school's foyer. (Tr. 3, p 123, L 19-22), or he could go to the media center. (Tr. 3, p 120, L 10-12).

Time Out of School

14. In the 4th Grade, Student was removed from the regular education classroom only when he was having behavioral difficulties or when he was unable to complete an assignment in General Education Environment. (Tr. 2, p 16). Testimony of Special Education Teacher. That year, they used the safe room as an accommodation for Student's needs. (Res. Ex. 5, p. 5 of 11).

15. The school district noted as early as April 20, 2008, in the 4th Grade year that Student didn't like to be in school and wanted to be at home. (Res. Ex. 4, Behavior Plan of April 20, 2008).

The school district tried to capitalize on that and turn it into a motivator for him in the IEP amendment of November 30, 2008. Therein, a plan was entered allowing him to go home from school early if he did all his school work and behaved appropriately. (Res. Ex. 9). In this instance, going home early was used as a reward or reinforcer.

16. In the IEP amendment of February 27, 2009, Student was placed on homebound placement for three days per week with only four hours of tutoring per week to compensate. This was done because Student was, in the words of Student's father, "overwhelmed" with school. (Res.

Ex. 10). Here, the home placement/exclusion from school is being used as a means to moderate his stress levels.

17. In the 4th, 5th, and 6th Grade, Student received disciplinary out-of-school suspensions in response to inappropriate behavior. (Res. Ex. 33).

18. Thus, the LEA has variously used the device of out-of-school time as a reward, a behavior/mood control, and as a deterrent or punishment. This is inconsistent and deleterious to Student. I believe that being sent out of school, for this student, is always a reinforcer.

Fourth Grade

19. A behavior plan was in effect for the Fourth Grade year through the Fifth Grade year. (See Positive Behavior Support Plan of April 20, 2008, Res. Ex. 4).

20. During the Fourth Grade year, from January through June 2008, Student's special education teacher would make provision to keep Student after school so he could make up lost work. This was done on an as-needed basis, when Student's disruptive behavior or refusal to work during the regular school day kept him from getting his class work done. This allowed Student to catch up his work in a quiet academic environment with the full attention of a teacher and an aide. Testimony of 4th Grade special education teacher. (Tr. 2 at p 44, L 13 to 46 L 1, and p 46, L 19 - p 47, L 5; and see Res. Ex. 1 pp 1 and 2).

During this time, the special education teacher provided 34.5 hours of after-school tutoring divided over 16 dates, ranging in duration from 3.5 hours as the longest session (See Feb 9) and several as short as one hour (See Feb 26, Mary 6, and June 1). (Res. Ex. 1 at pp 3 to 6 of 6).

This was done in collaboration with Student's Parents to keep Student in school and keep him on an academic par with his regular education classroom. (Test. of Special Ed. 4th Grade teacher. Tr. 2, p 47 at L 23 to p 48 at L 3).

Progress and Student Observation reports from April and May of 2008 demonstrate that although Student exhibited many disruptive, challenging, and off task behaviors, school personnel were persistent in their efforts to keep him on task. (Res. Ex. 40, pp 22 to 50).

Student consistently refused to do homework. (Res. Ex. 40 at pg 10 at bottom, and pp 19-20, 12, 14, 16).

With Student being frequently off task at school and refusing to do any homework at all, keeping Student after school with a tutor available to him is a responsible and sensible approach to the problem. Particularly so, where, as here, Student has demonstrated severely negative emotional responses to being unprepared in class. (Res. Ex. 40 at pg 10). The Parents acknowledged the effectiveness of this approach in a letter dated September 26, 2008. (Pet. Ex. 1, last page, top paragraph).

The classroom teacher noticed Student's behavior was also better following the after school tutoring effort. (Res. Ex. 5, p 10, 2nd paragraph).

21. Under Student's IEP of April 15, 2008, he was to be in regular education full time 90% of his time in the general education environment and 10% of his time in special education. (Res. Ex. 5), p. 9.

22. Student has refused to do any school work at home since the 4th Grade. [Student's Parents] have made it clear that he refuses to do homework at home and they have stopped arguing with him about it." (Res. Ex. 40, p 10, last sentence; see e.g., Ex. 40, pp 12, 14, 16, 19).

Fifth Grade

23. Student commenced his Fifth Grade year with an IEP, dated April 15, 2008. (Res. Ex. 5) and a Positive Behavioral Support Plan dated April 20, 2008, (Res. Ex. 4) in place.

These two documents were in force until September 26, 2008[1], when an IEP team meeting was convened and modifications made to Student's educational delivery. (Res. Ex. 8 at pp 2-3).

On September 22, 2008, Student had received a three-day disciplinary suspension. (Res. Ex. 33). The meeting note references a letter from Student's father outlining parental concerns and a request that Student be placed in a private school for autistic children, at the expense of the LEA. (Res. Ex. 8 at pg 2, first paragraph). The parental letter bears the same date as the IEP meeting; September 26, 2008. The letter complains

- that services of an aide are being provided by more than one person resulting in inconsistent service and a break in the routine that Student requires;
- that Student is not being given daily instruction on expectations for that day;
- that a safe room had not been assigned for him as required by his IEP, instead using a conference room;
- that a behavior assessment plan is not being carried out;
- not enough breaks being given;
- failure to modify class work;
- IEP team members leaving meetings;
- lack of LEA response to prior verbal requests for a specialist to observe Student in the classroom.

They then request an environment that will meet his special needs and teach him coping skills to permit integration back into public schools, specifically in a placement at a private school for the Autistic (Pet. Ex. 1). In the alternative, the Parents request Student be placed in a home school setting "until a better resolution is reached." (Pet. Ex. 1, p 2, last paragraph).

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[1]Res. Ex. 8, pp 2 and 3 bear the apparent date of April 26, 2008 and a faint correction above which reads "should be September 26, 2008."

The meeting notes reflect receipt of the parental letter and recognition of the Parents' request for private placement or home schooling until a resolution is reached.

The note then indicates the Parents agreed to the use of a "safe room" adjoining the special education room, where Student would be placed each "morning until 11:00 and then join his regular ed. Class."

Student's aide was to read a social story and review his daily schedule with him when he arrived each morning. These two items were a re-statement of proactive strategies already in his Positive Behavior Support Plan (*See* Res. Ex. 4 at p 2).

The September 26, 2008 meeting note also added two new features to his Fifth Grade IEP:

- that he be required to stay after school to complete unfinished work; and
- that recess will be taken away for any physical aggression toward adults and students. (Res. Ex. 8, p 2, second paragraph).

Student attended and the team talked to him "about behaviors and completion of assignments." The LEA's Special Education Specialist also talked to Student about the "new plan, safe room, breaks, consequences." (Res. Ex. 8, pp 2-3). Student and both of his Parents signed as attending.

This plan remained in effect for just over one month, until October 30, 2008 when a new IEP team meeting again changed his delivery plan. So from September 26, 2008 until October 29, 2008, a period of just over one month, Student would have been scheduled in the safe room with his aide from start of day at 8:00 a.m. until 11:00 a.m. (Res. Ex. 41 pp 1-15). He also would have been required to stay late after school if his work was not completed (*See* Res. Ex. 41, pp 2, 5).

Apparently, the IEP team felt that the changes, and re-statements in the September 26, 2008 meeting notes (Res. Ex. 8) represented "a better resolution to the situation" as requested by the

Parents, since the evidentiary record is devoid of documented prior written notice concerning the Parents' requests in the letter (Pet. Ex. 1).

24. In spite of the amendments to the IEP made on September 26, 2008, Student's behavior deteriorated further. Looking at Res. Ex. 41, behavioral problems were noted on October 1, 2008 ("disruptive" from 1:20 to 2:45)(Res. Ex. 4, p 2); October 5, 2009 (comment: Student "absolutely refused to do any work today"); (Res. Ex. 41, p 5); October 17, 2008 (10:00 to 10:30 "refused to do work", 2:30 to 2:45 "turned over desk - tore up papers) (Res. Ex. 41, p 6); October 21, 2008 ("refused to even try S.S. quiz, and we had a difficult time keeping him on task.") (Res. Ex. 41, p 12).

On October 22, 2008, Student had a disciplinary incident which went on for 3 ½ hours. Beginning at 8:30 a.m., he refused to leave the Occupational Therapist's room.[2] He climbed on equipment and refused to get off. The school's Principal was called and Student was taken to his safe room. The Principal was replaced by the school's Special Education Specialist. She and the aide had to hold the room door shut while student "stood on his desk and punched the ceiling tiles. He kicked the walls and [attending staff members], started hitting and pushing [attending staff members] to get out of room. When he was allowed out, he turned over tables and chairs. All this plus screaming his head off." The documentation notes that Student continued for 3 ½ hours, then quit and went to lunch and recess and then went home. (Res. Ex. 41, p 13).

On October 27, 2008, he was "impossible to keep on task. Loses focus easily (?). Talks in baby talk when he doesn't want to do something." (Res. Ex. 41, p 14).

On October 28, 2008, he refused to go to class or do any work from 8:30 a.m. - 12:20 p.m. He then had scheduled lunch and recess and went home at 1:20 p.m. (Res. Ex. 41, p 15).

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[2]Student's O.T. was terminated at the next IEP meeting eight days later. Res. Ex. 9.

25. On October 30, 2008, another IEP Team Meeting was held (Res. Ex. 41, p. 16 and Res. Ex. 9.) At this meeting, the team decided that Student should be allowed to leave school early each day he completed his work by noon and behaved appropriately. He was to stay "until the bus runs" if his work was not completed by noon. This provision was in place until February 27, 2009, although the October 30, 2008, note makes clear the tactic had actually been started earlier stating "Even with ½ days [Student] has still not been completing his work," revealing that the team had reason to doubt the efficacy of this approach even as they were instituting it. (Res. Ex. 9).

A review of Daily Behavior Reports shows that early dismissals had already occurred on October 3, 14, 15, 16, 17, 21, 22, 27 and 28, 2008 (Res. Ex. 41, p. 4, 7-10, 12-15) all of which were before the October 30, 2008 IEP meeting and the scheduling amendment.

26. After the IEP amendment of October 30, 2008, Student was allowed to go home early if his work was done by noon and he had good behavior. (Res. Ex. 9). That IEP amendment was in effect until the next amendment on February 27, 2009. (Res. Ex. 10). In that time period, Student was sent home from school early (i.e., before afternoon classes) nine times. Res. Ex. 41, pp 17, 18, 19, 21, 23, 25, 26, 27, 28.

But the early dismissals took place even when the preconditions weren't met: (on November 7, 2009, he went home early although all he completed was a spelling test. Res. Ex. 41, p. 17); (on November 14, 2009, he earned early dismissal in spite of refusing to do work and becoming so noisy he had to be removed from class. Res. Ex. 41, p. 25); (on November 20, 2009, he "didn't want to read his social story or make any goals today." He went home at 12 noon anyway. Res. Ex. 41, p. 27); (On January 13, 2009, he apparently did do his work and behave himself until lunch at 12:20 p.m. However, he was not allowed to leave early, and had a defiant, noisy, unproductive afternoon until 2:30. Res. Ex. 41, p. 42). No earned, early dismissals took place after December 3, 2008.

27. Following institution of the early dismissal policy pursuant to the IEP amendment on October 30, 2008, there were still incidents of class disruptive noise making and/or work avoidance behaviors on November 3, 2008, November 5, 2008, November 6, 2008, November 7, 2008, November 10, 2008, November 14, 2008, and November 20, 2008, (Res. Ex. 41 at pp. 18, 19, 20, 21, 22, 25, 26).

On December 10, 2008, Student apparently worked well in the morning, but for unstated reasons was kept after 12 noon. He became very disruptive, yelling and screaming. He was taken to his safe room where his behavior escalated to turning over desks and chairs. He stayed in the safe room until his father came to get him at 2 p.m. It was noted that Student would not again earn his early dismissal "until after Christmas Break." (Res. Ex. 41 at p 33).

A write-up concerning this episode on December 10, 2008 was produced the next day and indicated that Student had also choked another student during his lunch break. Ex. 41, p. 34.

Thereafter [Student] had episodes of refusing to do work every recorded day from December 11, 2008 to December 18, 2008. (Res. Ex. 41, p. 35 - 37).

After the resumption of classes on January 6, 2009, Student continued to have numerous episodes of noise making, disruptions, and work avoidance behaviors but also had a number of good productive days. Res. Ex. 41, p. 38-58. Loud and aggressive behavior is noted on Feb. 17, 2009, February 18, 2009, February 19, 2009, and February 24, 2009. Res. Ex. 41 at p. 59, 60, 61, 63.

28. The IEP Team again met on February 27, 2009. They noted Student had become "more frustrated and aggressive at school and also at home. It was noted Student "complains of hearing voices in his head." "School staff and parents are concerned [Student] may hurt himself or someone else." (Tr. 2, p 59).

The IEP Team then agreed that school was "overwhelming for him at this time." A schedule of only ½ day of school, two days each week was mandated for him. He was also to get homebound teaching services four hours per week. (Res. Ex. 10).

This meeting was attended by the school principal, his aide, his regular education teacher, a special education teacher who had never delivered direct services to student, (Tr. 3, p 57), and his two parents. Res. Ex. 10.

No reference is made in this document concerning the impact on delivery of services under his original comprehensive IEP of April 15, 2008, which was never fully superceded. Specifically, that document mandated 300 minutes (five hours) of Special Education Direct Services in the area of Social Skills to be delivered in a regular education environment. (Res. Ex. 5, at pg. 7).

29. Student apparently did not attend school or receive services between February 24, 2009 and March 17, 2009, as there are no notes for those intervening dates. Also, the March 18, 2009 note says "I am so glad to have [Student] back. I hope our new plan is successful." (Res. Ex. 41, pp 63, 64). Student received a three-day suspension to begin February 25, 2009 which would have continued through February 26 through February 27, 2009. (Res. EX. 33). The IEP Team met and changed Student's attendance schedule on February 27, 2009. Eleven school days fell between February 27, 2009 and March 17, 2009. The reason for those absences is unexplained in the record.

The teacher who was to provide homebound tutoring services four hours per week began those services to Student on March 17, 2009. (Res. Ex. 7 at pp 2, 3). Her last date of service to him was June 2, 2009. (Res. Ex. 7 at pp 8, 9).

There are only 19 daily behavior reports in the evidentiary record bearing dates between March 17, 2009 and June 2, 2009 (Res. Ex. 41, p 64-85), so I can only conclude that he attended class 19 times for an abbreviated school day during this period. (By my count, there were 53 regular

school days during this time period). In addition, Student received 38 hours of tutoring time (Res. Ex. 7).

Even giving full credit for each day he attended, there is a discrepancy of 34 days between what Student would have received versus what a regular education student in his classroom received. All this time, the original April 15, 2008 IEP, still in effect, except for it's amendments, indicated that Student was in general education 90% of the time and 10% in a special education environment, when in fact, Student was in school only 8 hours a week on average and was receiving services out of the school environment four hours a week. The rest of the time, presumably he was sitting at home entertaining himself.

30. No medical or psychiatric documentation exists in the record to justify the exclusions from school, pursuant to the February 27, 2009 IEP amendment (i.e., Res. Ex. 10).

31. The IEP of April 7, 2009, which was in effect at the beginning of Student's 5th Grade year (2008-2009), provided for him to have a "Personal Care Aide (direct 1:1) in all settings, at all times." (Res. Ex. 11, p 10 of 10).

32. After January 26, 2009, Student had many episodes of disruptive behavior, and making noise in class. (Res. Ex. 41, p 48, 51, 53, 54, 56, 59).

On February 18, 19, and 24, 2009, his behaviors became angry and violently aggressive. On this last day, he "head butted" his aide in the chin. (Res. Ex. 41, pp. 60, 61, 63).

TRANSITION: Fifth to Sixth Grade

33. In spite of the profound problems he had in 5th Grade, even with a 1:1 aide, it was apparently determined not to be necessary in 6th Grade, the IEP of May 29, 2009 instead calling for Behavior Management Adult Assistance in conjunction with a great percentage of time in a special education environment. (Res. Ex. 12, p. 7).

While Student ended his 5th Grade year on a very abbreviated schedule, inexplicably his next IEP, prepared while he was still in that shortened schedule, changed him to a full school day for the next year. No document was produced to show the need for the change. Indeed, the notes attached to the May 29, 2009 IEP indicate "two days school, 3 days homebound. He does better when he is on this schedule." (Res. Ex. 12, p 11).

Student's IEP for the 2009-2010 year was written on May 5, 2009. (Res. Ex. 12). In that IEP, Student is to receive Behavior Management Adult Assistance across the board - may be an aide that works with two or three students. Res. Ex. 12, pp 7, 11. But the middle school Vice Principal who chaired that IEP meeting (Tr. 3, pp 195-196) indicated that in spite of that IEP provision, Student could be placed in a special education classroom where the special educator could be considered adult assistance. (Tr. 3, p 198 (testimony of middle school Vice Principal)).

The aide actually on staff for Student's assistance was described as responsible for meeting Student at school in the morning, going over a story board, reviewing his schedule for the day, both his regular schedule and any anticipated changes from the usual daily route. (Tr. 3, p 207).

Student had an aide with him all day after his return to school on November 9, November 10, November 12, November 13, November 16, November 18, November 19,and December 17, 2009. (Res. Ex. 38, pp 1-9, 11).

Even though present levels of performance are based on what had happened at Student's then present elementary school (Tr. 3, p. 236, L 6-10), no personnel from Student's 5th Grade program were in attendance at his May 5, 2009 IEP Meeting. (Tr. 3 pp 209-210, testimony of Vice Principal). In attendance were Student's two Parents, a 6th Grade regular educator, a 6th Grade Special Educator, and the middle school's Vice Principal. (Res. Ex. 12, p 2). This was intended at the time to be their "main meeting to transition Student to his new school and program. (Tr. 3, p 236, L 1-5).

Sixth Grade

34. The activities for which he was suspended during this school year (6th Grade, 2009-10) are as follows:

a.) On October 14, 2009, Student was verbally abusive to staff including the Principal, and after being removed from class to an isolated setting he threw chairs and kicked a filing cabinet. (Res. Ex. 33, p 7 of 7).

b.) On October 16, 2009, Student refused to comply with a reasonable request by Principal to put away a Spiderman toy item brought to school with him. Student refused, repeatedly using extremely obscene language toward her and threatening to kill her. (Res. Ex. 33, p 6 of 7).

c.) On November 19, 2009, Student ran up behind the 6th Grade Principal and hit her in the back. He tried to jab a pin into the middle school's General Principal, and he raised his fist to hit his aide. (Res. Ex. 33, p 5 of 7).

d.) On November 30, 2009, Student left class without permission, spat on two staff members, left the school building, came back, and then again ran from Principal and staff disrupting students in the classroom and in the hallway, then proceeding to run to the music wing and into the auditorium. (Res. Ex. 33 pg 4 of 7).

e.) On December 4, 2009, Student became disruptive in class and was removed to the ALC Room (Student's safe room). Once there, he became aggressive physically and verbally. He turned chairs upside down, threw tennis balls and spat at his aide and Principals. The County Special Education Office had to be called for advice and assistance. One of the county's Special Education Specialists arrived to intervene. (Tr. February 2, 2010 at p 130, Res. Ex. 33, p 3 of 7).

f.) On December 9, 2009, Student left the classroom and tried to run from his aide. She took him to the ALC (safe room) but he became more aggressive and threatening toward her, throwing tennis balls at her, over turned tables and chairs, and tried to hit her with his fist. A County Deputy Sheriff in the school building intervened but Student continued growling, screaming, and turning over desks. He broke a metal piece off a desk and beat on the door with it. The deputy intervened to take it from him. Then Student became focused on the deputy's gun and taser and wanted to touch them, making several attempts to do so, and having to be physically pushed away by the deputy to prevent this. Student shoved and hit his aide repeatedly in spite of the law officer's presence. Several teachers, the aide, and at least two principals were involved in addition to the deputy, who had to stay for about an hour to resolve this incident.

An injury report was filed on behalf of the aide who suffered a dark purple bruise the size of a golf ball on her chest. The deputy sheriff filed a complainant action report with the county's Sheriff's Department for battery and destruction of property. Significantly, the deputy indicated his opinion that Student was a threat to the safety of the students and staff. (Res. Ex. 35, pp 1 and 2; Res. Ex. 33, p 2 of 7).

As a consequence of these six incidents, Student received four out-of-school suspensions, one in-school suspension, and a referral to the IEP Committee. (Res. Ex. 33, p 1 of 7). This document indicates the total number of out-of-school suspension days accumulated this school year is six plus one in-school suspension day.

The suspension record indicates that only one "out-of-school" suspension (i.e., OSS) day was given for each of the offenses on October 14, 2009 and October 16, 2009. The evidentiary record is less clear on this matter.

While the Vice Principal of Student's school testified that only the two days of suspension were imposed, the Parents produced a document in rebuttal to this testimony. (Pet. Ex. 30). This document, dated October 16, 2009, and bearing the heading "Student Discipline Referral" describes Student's disciplinary offenses on October 14, 2009 and October 16, 2009.

On the bottom portion it states: "8:20 a.m. Info. was discussed with mother over phone 10/16/09.

The box for "Out-of-school suspension" has been checked and in the space left to fill in the number of days of the suspension, it states "until further notice."

Under the remarks section is written "Refer to IEP team for possible change of placement; suggest Parents contact Marshall University Autism Center for crisis intervention. Out of school setting until/unless revised IEP plan is developed and implemented." (Emphasis added) It then bears the signature of the school's Vice Principal and notes that "Copy sent with parent."

The attendance records indicate that Student was then absent from school on school days Wednesday, October 14, 2009 as a full day out-of-school suspension, Friday, October 16, 2009, as a full day suspension, and then every consecutive school day from Monday, October 19, 2009, until Thursday, October 29, 2009, a total of eleven school days. (Res. Ex. 32, p 2).

The interpretation of these documents that Student had indeed been blocked from coming to school is consistent with the Psychological Assessment report of October 30, 2009 (Res. Ex. 16, p 1), which Assessment was actually performed on October 23, 2009.[3] Therein in the third paragraph describing "this school year," the school psychologist relates that "In early October

[3]Respondents assert Student was in school on October 23, 2009, but the attendance record (Res. Ex. 32, pp. 2 and 4) clearly shows he was absent from class. The psychologist's report demonstrates he was there for the purpose of being tested. (Res. Ex. 16, p 1) and the sign out log (Res. Ex. 34, p 58) shows Student was picked up at school at 1:00 p.m. when he was "finished testing."

[Student] became abusive (throwing chairs at an aide and at the Assistant Principal) and increasingly disruptive (kicking, foul language, destruction of property). He was then placed on homebound instruction." (Emphasis added) (Res. Ex. 16, p. 1.)

This narrative is consistent with the mandate for "out-of-school setting" included in Pet Ex. 30, and with Student's mother, who indicated her understanding that Student was not to come back to school until crisis intervention was in place or an IEP meeting had been held (Tr. 1, p 230) and also that the Vice Principal offered homebound instruction. (Tr. 1, p 231).

Twelve school days following the suspensions, a meeting of the IEP team was held on Tuesday, November 3,2009, at which time it was noted "Student will return to school Monday, November 9." That document is marked "submitted by [Vice Principal] 11/4/09." (Res. Ex. 20, p 3).

35. A behavior support plan dated September 9, 2009, was in place throughout the time period of the above six behavioral incidents (Res. Ex. 13/ Pet. Ex. 7) but as early as October 1, 2009, the IEP team noted "A Behavior Management Plan" was written to allow [Student] a safe place to go and to take a break for 10 minutes. The IEP, discussing this BIP, stated "This plan was implemented but not successful" (emphasis mine). [Student] would scream, lay on floor and bark like a dog. He would refuse to do any written or other work in class. He blurted out repeatedly." (Res. Ex. 14, p 3).

The County's Director of Special Education attended and chaired this meeting (Res. Ex. 14, p. 1), also attending were two other Special Educators and the Vice Principal of Student's school. (Res. Ex. 14, p. 1). (One of these Special Educators actually prepared an FBA report on December 14, 2009) (Res. Ex. 22).

It was also noted by the IEP Team on October 1, 2009 that "[Student] has not been successful in attending school this year. He is usually so disruptive that he has to be picked up by his parents." [Emphasis mine.] In this hearing, the LEA has taken the position that Student's Parents, rather than the school, are responsible for his excessive absences from the classroom, but this comment clearly rebuts that assertion. (Res. Ex. 14, p 3 of 11).

36. Following behavior incidents this school year, and an IEP Meeting held on November 3, 2009, a Functional Behavioral Assessment (FBA) was performed by the school district, the report of which is dated December 14, 2009. (Res. Ex. 22). Two Special Educators employed by the LEA prepared it. (Tr. 4, pp 145, L 12-16; p 149, L3-5).

37. Notice of an IEP meeting to review the FBA and to create and revise the behavior plan was sent on the same day, December 14, 2009, indicating the date of the upcoming meeting to be December 23, 2009. (Res. Ex. 23, p 1). That IEP meeting was never held because the present due process action was filed on December 22, 2009.

A second notice was also sent on December 28, 2009 for a proposed IEP meeting on January 5, 2010. Neither notice was signed or returned by the Parent. (Res. Ex. 23, p 2).

38. A draft of a Positive Behavior Support Plan was created based on the FBA of December 14, 2009. (Res. Ex. 24). It bears the date of January 4, 2010, but the author is not identified on it.

39. Student's absences between September 21 - 29, 2009, were at the Parents' request. They wanted to revise Student's IEP, and the Parents had been unable to get him to come to school. (Tr. 3, pp 226-227). The vice Principal asked the attendance dean to note those days as health exclusion. (Tr. 3, pp 227-228). This was done to give the Parents time to seek medical attention for

Student and for the county's Special Education Director to set up an IEP meeting without the Parents being pursued for truancy violations. (Tr. 3, p 228).

40. As to Student's absences on October 19, 2009 to November 11, 2009, the school's Vice Principal testified she did not know why Student was not in school. (Tr. 3, p 229). However, just three days before that, she had sent the Parents a notice indicating that Student was suspended "until further notice" and that he "was to have an "out-of-school setting until/unless revised IEP plan is developed and implemented." (Pet. Ex. 30).

The Vice Principal testified that she again changed the reason code on these absences to "Health Exclusion" after being informed by the Country Director's Report that Student had eleven unexcused absences. (Tr. 3, p 229). She indicated she did this to shield the Parents from being pursued for truancy violations. (Tr. 3, pp 226-228, 229-230). She also testified inconsistently that she didn't know why Student wasn't attending from October 19 to November 11, 2009, (Tr. 3, p 229, L 4-8) and alternatively that she did know it was for medical concerns. (Tr. 3, p 230, L 2-5). Further, she testified that she did discuss homebound services with Student's Parents as a possible interim placement. (Tr.3, p 231, L 13-18; p 232, L13-19; p 233, L 1-5).

41. The sign in/and sign out sheets for academic year 2009-2010 reflect that the school called his Parents and sent him home early on six occasions: September 9, 2009, September 16, 2009, September 17, 2009, October 14, 2009, October 16, 2009, and November 10, 2009, (Res. Ex. 34, pp 50, 53, 54, 56, 57 and 59). Two of these days were also out-of-school suspension days (i.e., October 14 and October 16, 2009) (Res. Ex. 33, p 1).

42. On November 9, 2009, Student had an episode where he ran around the school building then left the building and walked to his mother's place of work which was relatively near the school. The Vice Principal followed him and when they reached the mother's workplace,

Student's mom and the Vice Principal walked him back to school. After he returned to school, Student's mother left, and a series of defiant, loud, and aggressive actions followed, culminating with Student again running through the halls of the school. He kicked, slapped or pushed furniture into at least three different adults. He finally had to be restrained using Crisis Prevention Intervention (CPI) techniques. His father was called to take him home, even though it was the end of the day because it was feared what would happen if he rode the bus. (Res. Ex. 38, p. 2 of 13; Tr. 3, pp 250-252).

43. Student is under the care of a Pediatrician, a Psychologist, and a Pediatric Psychiatrist. (Tr. 1, p 2.; Res. Ex. 16, p 1). He has four prescriptions for depression and anxiety, ADHD, mood stabilization, and to aid in sleep. (Res. Ex. 16, p 1).

44. A draft proposal for a Positive Behavior Support Plan, dated January 4, 2010, has been created by the LEA. It has not been reviewed yet by an IEP Team. (Res. Ex. 24; Tr. 4, p 149). It's authorship is undetermined. (Tr. 4, pp 22 and p 146, L 5-6).

45. This year (6th Grade 2009-2010) Student had an aide available to him for supervisory needs when he is not in a special education classroom. (Tr. 3, pp 196-198). She assists him with his class assignments and implements modifications such as shortening them or breaking them into smaller pieces so as not to overwhelm him. She also delivered the behavior reinforcers from his behavior plan. (Tr. 3, p 116, L 8-23). She has worked with this student throughout this year, with the exception of days when Student was absent from class. Occasionally, when she was in class with Student, if another student close by needed specific help, she might help them. (Tr. 3, p 118, L 6-22). When Student had episodes of agitation or noisiness, she would accompany him out of the classroom to a quiet place where they could work together. (Tr. 3, p 120, L 6-15). She also

accompanied him on his break times which were permitted under his behavior plan. (Tr. 3, p 129, L 5-18).

46. Student was sent home for a disciplinary offense on November 10, 2009, but it was not reflected as a suspension. (Res. Ex. 38, p 3; Tr. 3, p 132; Res. Ex. 33, p 1). After the Principal called Student's Parent, he was picked up at school at 12:30. (Res. Ex. 34, p 59 of 64).

47. This academic year (2009-2010), Student repeatedly missed entire class periods, or multiple class periods because he simply refused to go. *(See e.g.*, Res. Ex. 38, pp 4, 5, 6, 7, 8, 9 (6th, 9th and 10th periods), 10, 11).

Student regularly refuses to do class work. (Res. Ex. 38, p. 2, 8).

48. Petitioner's Exhibit 30, submitted in rebuttal of the testimony of the LEA's 6th Grade Vice Principal was first produced on the fourth day of hearing and, not produced in the exchange of documents on January 21, 2010, prior to the hearing. However, no objection was offered pursuant to the 5-day rule. When asked to state his objection in full, (Tr. 4, p 9 L 17-19), Respondent's counsel then proceeded to state that (Res. Exhibit 33), (which documented the school's record of suspensions for Student) and also (Res. Ex. 34), had already been admitted, and that those documents demonstrated the days he was out. (Tr. 4, p 10, L 6-12, L 3). After the Respondent's counsel recited this objection, the hearing officer ruled that the document was admissible as a rebuttal document inasmuch as it seemed to support the Parents' testimony and be in conflict with the testimony of the 6th Grade Vice Principal. (Tr. 4, p 12, L 4-13).

The Vice Principal testified that Student's violations of school conduct code on October 14, 2009 and October 16, 2009 resulted in one day's suspension each or two total. (Tr. 3, p 232, L 13-14). The suspension and attendance records also reflect this. (Res. Ex. 33 and 34). However, Pet. Ex. 30 reflects the suspension period as "until further notice." It bears the apparent signature of the

6th Grade Vice Principal. It also says "out-of-school setting until/unless revised IEP plan is revised and implemented." There is no document in the record which would constitute notice regarding the end of the suspension period.

An IEP meeting was next held on November 3, 2009. (Res. Ex. 20). No written notice of IEP meeting appears in the record relevant to this meeting.

49. School hours during 4th, 5th, and 6th Grade were from 8:00 a.m. to 2:45 p.m., a duration of 6.75 hours a day (Res. Ex. 40 and 41 and 34 at pp. 37 and 56).

50. Supervisory aides were provided to Student all three instructional years in question. Student's most recent IEP, dated October 1, 2009, calls for "Behavior Management Assistance." (Res. Ex. 14, p 6 of 11).

51. Student's Westest Performance in the Fourth and Fifth Grade years was as follows:

	4TH GRADE	**5TH GRADE**
SUBJECT	**SCORE (PROFICIENCY LEVEL)**	**SCORE (PROFICIENCY LEVEL)**
MATH	640 (3)	577 (2)
READING	643 (3)	401 (2)
SCIENCE	660 (4)	557 (2)
SOCIAL STUDIES	637 (3)	424 (3)

The Proficiency Levels represented are (2) below mastery; (3) mastery; and (4) above mastery.

(Res. Ex. 29)

Student fell from achievement of at least mastery in all subjects, with above mastery in the Social Studies area, in the Fourth Grade, to below mastery in three out of four categories in the Fifth Grade. Further in Social Studies, where he maintained the mastery achievement level, his raw score fell by over 200 points (Res. Ex. 29). The Special Education Specialist for the LEA indicated he was

told that Westest scores fell for many 5th Grade students during Student's Fifth Grade year, due to the introduction of a new, more difficult , Westest II in the school that year (Tr. 4, pp 151). But no documentary corroboration for this hearsay representation was offered. However, Student missed over 34 days of school pursuant to the IEP amendment of February 27, 2009, and its part-time attendance provision. It is my factual conclusion that although the test change may have had an impact on these scores, the loss of the equivalent of 6 weeks and 4 days of school had to also be a major factor in the decline in Student's achievement levels.

52. Student's final year end grades earned for the Fourth and Fifth Grade years were:

	4TH GRADE	**5TH GRADE**
SUBJECT	**GRADE**	**GRADE**
ARITHMETIC	S (Satisfactory)	U (Unsatisfactory)
READING	C	D- *
LANGUAGE	B	C- *
HANDWRITING	S-	U
SPELLING	A	D *
SOCIAL STUDIES	B	D *
SCIENCE	C	C
HEALTH	A	F *
PHYSICAL EDUCATION	S	S
ART	S	S
MUSIC	S	S

(Res. Ex. 30)

* Shows that Student lost more than a full letter grade in 5 subjects including the subjects of Reading, Language and Spelling, all of which are critical foundational academic skills. He also went from Satisfactory to Unsatisfactory in Arithmetic.

53. On October 23, 2009, Student was tested on the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), an intelligence or "IQ" test. He achieved the following scores:

Verbal Comprehension	99	average
Perceptual Reasoning	115	high average
Working Memory	91	average
Processing Speed	62	impaired

This yielded a General Index Score of 107 which is in the average range. The psychologist noted as to the impaired rating score in Processing Speed that it "may make the task of comprehending novel information more time consuming and difficult. A weakness in simple visual scanning and tracking may leave a student less time and mental energy for the complex task of understanding new material." (Res. Ex. 16, p. 3).

54. There is no evidence in the record indicating that on the two occasions homebound education was put into place (i.e. 3 days per week under the February 27, 2009, IEP amendment; and during the period between October 17, 2009, and November 2, 2009) that the IEP Team considered any less restrictive placement options for the Student.

55. On the morning of the second day of hearing, the Petitioner brought the Student to the hearing room, immediately prior to the start of the hearing day. The Student's Parents introduced him to me, and we greeted each other. He indicated that he liked school, that Science was his favorite subject, and that he wanted to work on Jeff Gordon's NASCAR driving team when he grew up. Student was in the courtroom, probably less than 5 minutes while I was there. He was not asked to testify but rather was removed from the building before the hearing commenced. Respondent's counsel was also in the room during this time. My impressions of Student were of a normal

appearing child for his age. He interacted in a socially appropriate manner, and expressed himself well.

IV. CONCLUSIONS OF LAW

1. Petitioner, by his Issue 4, has challenged the appropriateness of the FBA performed on the Student and reduced to report form on December 14, 2009 (Res. Ex. 22).

> (a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child , subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

34 C.F.R. §300.502(a)(1) and (2), authorized by 20 U.S.C. §1415(b)(1).

> ...*Parent right to evaluation at public expense.*
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –
>
> (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 and 300.513 that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. §300.502(b)(1) and (2) authorized by 20 U. S. C. §1415(d)(2)(A). (Emphasis added)

Further, Hearing Officers are expressly authorized to order Independent Educational Evaluations as part of a hearing on a due process complaint. 34 C.F.R. §300.502(d). Under authority of these provisions, I conclude it is appropriate that an order for an IEE be awarded as relief, where,

as here occurred , the appropriateness of the FBA, already performed by the LEA, was expressly put at issue in a hearing or where further assessment of the student is shown to be necessary.

2. "A disciplinary change of placement is a removal from the student's current educational placement for more than ten consecutive school days or a series of removals that constitute a pattern. A pattern is established because the series of removals total more than ten cumulative school days in a school year, the student's behavior is substantially similar to his/her behavior in the previous incidents that resulted in the series of removals, and additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another are present." W. Va. Policy 2419, Chap 7. Disciplinary Change of Placement, at paragraph 1. *Accord* 34 CFR §300.536 (a) Authorized by 20. U.S.C. §1415(K).

In this action, student was removed from the school environment for more than 10 cumulative school days in his 6th Grade year pursuant to a suspension and subsequent homebound placement commenced October 14, 2009, on October 16, 2009, and continuing to October 29, 2009. (2009-2010).

3. Where as here, cumulative removals constitute a change of placement, a manifestation determination is required to be made by the LEA, IEP Team and the child's parents. They must "review the relationship between the student's disability and the behavior subject to disciplinary action. 34 C.F.R. §300.530(e)

A manifestation hearing is to be conducted "within 10 school days of any decision to change placement . . ." 34 C.F.R. §300.530(e).

The purpose of the manifestation hearing is to determine: "i) if the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or ii) if the conduct

in question was the direct result of the district's failure to implement the IEP. 34 C.F.R. §300.530(e)(i) and (ii).

If either of these conditions are met, then "the conduct must be determined to be a manifestation of the student's disability, and the district must take immediate steps to remedy those deficiencies." 34 CFR 300.530(e)(3) Authorized by 20 U.S.C. 1415(k)(1) and (7).

In the present case, no manifestation hearing was ever held. Consequently, the student and his parents were denied the opportunity to receive benefits that might have emerged from such a finding. Although he was kept out of class for more than 10 days in October 2009, an FBA was not completed until December 14, 2009.

4. "District Actions. When conduct is determined to be a manifestation of the Student's disability, the IEP Team shall:

1) Conduct a FBA [Functional Behavioral Assessment] and develop a BIP [Behavioral Intervention Plan] if one has not been completed; or

2) Review the existing BIP and revise as needed to address the current behavior(s); and

3) Return the student to the placement from which the student was removed unless the parent and the district agree to a change of placement as part of the modification of the BIP as determined by the IEP team."

See 34 C.F.R. §300.530 Authorized by 20 U.S.C. §1415(k)(1) and (7), W.Va. Policy 2419, Chapter 7, §2A.

5. Children in West Virginia are required by law to attend school from the year they celebrate their sixth birthday until they reach their sixteenth birthday, subject to various exemptions, all of which are subject to confirmation by the attendance authority of the county. *See* W.Va. Code §18-8-1(a).

At subsection (d) is stated an exemption for physical or mental incapacity: "A child shall be exempt from the compulsory school attendance requirement set forth in subsection (a) of this section if the requirements of this subsection, relating to physical or mental incapacity, are met. Physical or mental incapacity consists of incapacity for school attendance and the performance of school work. In all cases of prolonged absence from school due to incapacity of the child to attend, the written statement of a licensed physician or authorized school nurse shall be required under the provisions of this article: Provided, that in all cases, incapacity shall be narrowly defined and in no case shall the provisions of this article allow for the exclusion of the mentally, physically, emotionally or behaviorally handicapped child otherwise entitled to a free appropriate public education." W.Va. Code §18-8-1(d). (Emphasis added)

6. With regard to school calendar years as set by County Boards of Education, West Virginia law provides that : "Within reasonable guidelines, the school calendar should be designed at least to guarantee that one hundred eighty actual days of instruction are possible." W.Va. Code §18-5-45(b)(5).

While this provision applies to the county-wide calendar, provided for all students, when Student was reduced to two half days of school, with another four hours of homebound tutoring, from February 27 to June 2, 2008, his opportunity to have one hundred eighty days of instruction per year was extinguished. Thus, he was placed at a severe disadvantage with regard to his access to education as compared to other students.

7. The IDEA demonstrates the "legislative conviction," that "adequate compliance with the procedures prescribed [in the Act] would in most cases assure much if not all of what congress wished in the say of substantive content in an IEP."

Board of Education of Hendrick Hudson School District v. Rowley, 102 S.Ct. 176, 206, 102 S.Ct. 3034, _____, 73 L.Ed.2d 690, _____, (1982).

Thus compliance with procedural requirements is the first area of inquiry in determining whether FAPE has been received.

8. "In matters alleging procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(i) impeded the child's right to a free appropriate public education;

(ii) significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Parents' child; or

(iii) caused a deprivation of educational benefit."

20 U.S.C. §1415(f)(3)(E)(ii) (Emphasis added)

9. "TIMELINE FOR REQUESTING HEARING - A parent or agency shall request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint . . ."

20 U.S.C. §1415(f)(3)(C).

10. The U.S. Supreme Court, in its decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, ___ L. Ed. 2d ___ (2005) indicated that the burden of persuasion, in administrative hearings assessing the appropriateness of an IEP, falls upon the plaintiff in States such as Maryland which have no specific rule allocating the burden. *Id.* 546 U.S. at 62.

The *Schaffer* Court, however, specifically declined to address the issue of whether states may, if they wish, put the burden upon the school district. *Id.* 546 U.S. at 61-62. Thus, this question remains unresolved by the high court.

In West Virginia, state policy indicates "The Burden of Proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual's education needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon the school personnel recommending the matter in contention." W.Va. Policy 2419, Chapter 11 §3A, at the third paragraph. Although, as the *Schaffer* court notes, the Placement of the Burden of persuasion will only be determinative in those cases where there is "evidentiary equipoise." *Id.* 546 U.S. at p. 58.

11. The IDEA allows a Hearing Officer to fashion appropriate remedies, and compensatory education is an available option to make up for a denial of FAPE. *P. by Mr. and Mrs. P. v. Newington Board of Ed.*, 546 F.3d 111, at 123 (2d Cir. 2008). See also, *Mrs. C. Wharton*, 916 F.2d 69, at 75-76 (2nd Cir. 1990).

In *P. by Mr. and Mrs. P, supra,* the Court upheld a hearing officer's order that the school hire a professional consultant on issues of inclusion and that that consultant participate in the completion of an FBA.

The hearing officer's authority to award relief under the IDEA is generally co-extensive with that of a reviewing court. *Cocores v. Portsmouth New Hampshire School District*, 779 F.Supp. 203, 205 (D. N.H. 1991).

Compensatory relief should be awarded by a qualitative, not a quantitative standard. The compensatory relief awarded should fit the deficiencies found to exist consequent to the denial of FAPE found to be present and the individual child's needs. This decision is a fact specific exercise of discretion by the Hearing Officer. See, *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

12. In West Virginia the placement options for school age children ages six to twenty-one, in order from least restrictive to most restrictive are

Gen Ed – Full Time in GEE at least 80 % of time

Gen Ed – Part Time in GEE 79% to 40% of time

Special Ed – Separate Class Gen Ed less than 40%

Special Education – Special School

Special Education – Out of School Environ

Special Ed – Residential Facility

Special Ed – Correctional Facilities

Resource rooms are listed as an option under General Ed – Part Time. Instruction in the home is an option under Special Ed – Out of School Environment. WV C.S.R. §126-16-3, W.Va. Policy 2419, Chapter 5, Section 2.J.A., see also 34 C.F.R. §300.115, authorized by 20 U.S.C. §1412(a)(5).

Educational services delivered in the student's home, or other non-school environment, such as public libraries, are characterized as Special Education – Out of School Environment and are more restrictive placements on the continuum of services than are special education classes or special education – special schools. *See*, W. Va. Policy 2419, WV C.S.R. §126-16-3, Chap. 5, Section 2, J.A.

Student was placed on homebound instruction 3 days per week pursuant to an IEP amendment dated February 27, 2009, (Res. Ex. 10), without any showing that a less restrictive placement was inappropriate.

Student was again placed on homebound placement October 17 to October 29, 2009, following a two day suspension without benefit of an IEP Meeting, or manifestation hearing, without any discussion or showing that a less restrictive placement was inappropriate.

13. The IDEA requires that children with disabilities be educated in the Least Restrictive Environment, which means:

> "(i) To the maximum extend appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

34 C.F.R. §300.114(a)(2) authorized by 20 U.S.C. §1412(a)(5). Thus the LRE consideration focuses on the question "with whom the student is educated rather than where the student is educated." West Virginia Policy 2419; W. Va. C.S.R. §126-16-3, Chap. 5, Section 2, J(1).

14. "in determining the educational placement of a child with a disability including a preschool child with a disability, each public agency must ensure that –

> (a) The placement decision –
> (1) Is made by a group of persons, including parents, and other persons knowledgeable about the child, the meaning of the evaluation data and the placement options; and
> (2) Is made to conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;
> (b) The child's placement –
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;..."

34 C.F.R. §300.116(a) and (b), authorized by 20 U.S.C. §1412(a)(5).

In this case the 5th Grade IEP amendment of September 26, 2008, (Res. Ex. 8), placed him in a resource room (safe room) from 8:00 a.m. to 11:00 a.m. daily which is 44.44% of the time,

shifting him from Reg Ed – Full Time to Reg Ed – Part Time. The next amendment on October 30, 2008, (Res. Ex. 9), moved him back to the Reg Ed – Full time placement, with all his classes in Reg Ed class room environments. The third amendment on February 27, 2008, (Res. Ex. 10), moved him to a homebound placement 3 full days a week and Student's 2 school days were shortened to 4 hours each making the majority of his time in an out of school environment. These three changes of placement were made without any documentation that the impact on Student's placement was considered. The original IEP of April 15, 2008, was never rescinded, and at all relevant times it indicated Student was Reg Ed – Full Time, GEE 90% - SEE 10%, (Res. Ex. 5, p 9 of 11).

Analysis of less restrictive placements by means of the provision of supplementary aids and services is not reflected in any way in the amendment documents (Res. Exs. 8, 9 and 10).

15. The Basic Right to a free appropriate public education (FAPE) guarantees a child "access to special instruction and related services that are individually designed to provide educational benefit." *Bd. of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 201; 73 L.Ed.2d 690, 708; 102 S.Ct. 3034 _____ (1982).

A school district cannot discharge its duties under the IDEA by providing a program that produces only minimal or trivial academic advancement. *Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991) aff'd 114 S.Ct. 361 (1993) citing *Hall ex rel. Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir 1985). But neither is it required to provide every service or accommodation which might bring a child with disabilities an educational benefit. *In re Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 199 (1982).

Special Education Services provided to handicapped children are not guaranteed to produce any particular outcome. *Rowley* at 458 U. S. 208, 73 L.Ed.2d 713, 102 S.Ct. 3052 (1982). The

amount of appropriate advancement will vary depending on the abilities of the individual student. See, *In re Conklin*, 946 F.2d 306, 315-316 (4th Cir. 1991).

16. In *Oberti by Oberti v. Clementin School District*, 995 F.2d 1204 (3rd Cir. 1993). That Court adopted a two prong test for determining whether a child can be satisfactorily educated in a regular classroom with supplemental aids and services or alternatively, whether a more restrictive placement is appropriate. That is:

> "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom, (2) the educational benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class. If after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated special education class, the court must consider the second prong of the mainstreaming test, whether the school has included the child in school programs with non-disabled children to the maximum extent appropriate."

Id. at 1217-12-18.

This test was also adopted for use by the Second Circuit in *P. by Mr. & Mrs. P. v. Newington Board of Education*, 546 F.3d 111 (2nd Cir. 2008).

17. *In dicta*, the U. S. Supreme Court has indicated its opinion, generally, that parents in conflict with school districts should have liberal access to IEEs.

In their words:

> "A 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. §300.502(b)(1) (2005).' IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available , and who can give an independent opinion. They are not left to challenge the

> government without a realistic opportunity to access the necessary evidence, or without an expert with the fire power to match the opposition."

Schaffer v. Weast, 546 U.S. 49, 60-61, 126 S.Ct. 258, _____ (2005)

18. IDEA's grant of equitable authority empowers a court to order school authorities to reimburse Parents for expenditures on private special education for a child if the court determines that such placement, rather than a proposed IEP, is proper under the Act. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002; 85 L.Ed.2d 385 (1985); accord *Florence County School District Four v. Carter*, 510 U.S. 7, 15; 114 S.Ct. 361, 366; 126 L.Ed. 2d 284, _____ (1993); *See also* 20 U.S.C. §1415(e)(2).

19. Reimbursement for a private unilateral placement is an equitable remedy, and as such the Court "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable." *Florence County School District Four v. Carter*, 510 U.S. 7, 15; 114 S.Ct. 361, 366, _____ (1993); 126 L.Ed. 2d 284.

20. The IDEA has as one of its goals that disabled children have "access to the general education curriculum, in the regular classroom, to the maximum extent possible..." 20 U.S.C. §1401(e)(5)(A).

This would include enabling disabled children to attend school during the hours that non-disabled attend, unless that is demonstrated to be inappropriate for the individual eligible child in question.

V. DISCUSSION

Background

The Issues in this case arise as a consequence of the behavior of the subject student. Now eleven years old and in the Sixth Grade, problems have been ongoing since at least the Fourth Grade. The time period which has been examined in this matter goes back two full calendar years, the duration of the applicable statute of limitations. Student has ADHD, Aspergers Syndrome, anxiety and depression. Student does not like to do written school work. He makes noises in class; vocalizations sometimes imitating cat, dog and monkey sounds. He may get down on the floor, sit with his feet up on the chair, or refuse to sit at all. When pressed to do work he doesn't want to do he may shout, scream, growl, hit, punch, push or spit on school personnel and vandalize school property. On at least 2 occasions he has run away from school personnel, running around the school building, and on one notable occasion, walking to his mother's workplace with the school's vice-principal in pursuit. Various techniques were tried to get Student to do his work. He has been kept after school to finish work left undone, he has been offered early dismissal if his work was done and behaviors were appropriate.

A Behavior Plan was developed on April 20, 2008, near the end of his Fourth Grade year, which, among other things, provided for numerous rewards for good behavior and consequences for bad behaviors, as well as for the use of a safe room, a small private room, where the Student and his aide could go for him to work on his class work or cool down emotionally, a place where his vocalizations and behaviors would not be a distraction to his classmates.

No less than 8 IEP Meetings have been held in the past 2 years: 4/15/08; 9/26/08; 10/30/08; 2/27/09; 4/7/09; 5/29/09; 10/1/09; and 11/3/09. Plans have varied from Reg. Ed. Full Time – with 90% GEE/10% SEE, to Gen Ed. Part Time – 60% GEE/40% SEE, the latter of which is his present

placement. He had one IEP which had him in school only a half day, 2 days per week, a total of 8 hours in the school building per week, with 4 hours of tutoring provided in a homebound setting. Use of the saferoom has varied between as needed only, to a scheduled placement there 3 hours every school day morning. He has been out of the classroom a lot. Compounding the problem further, Student would much rather be at home than in school, and he has, in fact, had a very high number of absences from school. Some absences are due to doctor's office visits, or medical /health related issues, and apparently, some days, Student just cannot be persuaded by his parents to come to school. The extreme nature of his outbursts and behaviors have also been occasions for disciplinary suspensions. All efforts at school and home appear to have failed to beneficially modify his behaviors. His inappropriate behavior seems to be increasing in both frequency and severity during this past Autumn semester. Clearly, something needs to be done to bring this student under control. The ultimate dispute here is what that something might be. The school insists its actions past and present have all been appropriate for Student, and that any deficiencies which might exist are ultimately due to the failings of the Student or his parents. The parents are fed up with the school's efforts which they see as ineffective and isolating to Student, and they now want Student placed into a private day school for an intensive behavior modification program, with Student later being gradually phased back into the public schools.[4]

Issue 1

WHETHER STUDENT HAS BEEN DENIED FAPE, AS A CONSEQUENCE OF THE SCHOOL DISTRICT'S FREQUENT REMOVAL OF THE STUDENT FROM HIS

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[4] This understanding of the Parents' requested relief is gleaned from their post-hearing brief. No evidence at all, concerning the requested private school placement, was provided at hearing.

CLASSROOM, INCLUDING TIMES HE WAS SUSPENDED FROM SCHOOL, SENT HOME EARLY FROM SCHOOL, AND TIMES HE WAS PLACED INTO A HOMEBOUND EDUCATION SETTING.

When discussing a FAPE, the starting point is access to special education and related services. See *Bd. of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 201; 73 L.Ed.2d 690, 708; 102 S.Ct. 3034 _____ (1982). The education and related services are to be individually designed to provide educational benefit. *Id.* No particular result or outcome is guaranteed. *Id.* at 458 U.S. at 208, 73 L.Ed.2d at 713, 102 S.Ct. At 3052 (1982). The amount of appropriate advancement will vary depending on the particular student's abilities. See *In re Conklin*, 946 F.2d 306, 315-316 (4th Cir. 1991).

It must not be a minimal or trivial academic advancement, *Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991) aff.'d 114 S.Ct. 361 (1993), but neither is it required to provide every service or benefit which might bring the child an educational benefit. *Rowley, supra* at 458 U. S. At 199.

In this issue, the Petitioner directly challenges the actions of the LEA with regard to Student's access to the school environment.

The relevant time period of examination in this case is two years, pursuant to the provisions of 20 U.S.C. §1415(f)(3)(C). The Petitioner contends that for the two years prior to the filing of Petitioner's complaint (i.e., from December 22, 2007 to December 22, 2009) Student was excessively removed from the classroom environment. This time period covers three separate academic years:

Dec 22, 2007 to June 08 - Student's 4th Grade year;

August 2008 to June 2009 - Student's 5th Grade year; and

August 2009 to December 22, 2010 - Student's 6th Grade year.

For the sake of clarity, I will cover the events and actions of each year separately.

Fourth Grade: The earliest IEP document presented as evidence in the case is dated April 15, 2008. (Res. Ex. 5). This would have been prepared toward the end of his Fourth Grade tenure in anticipation of his promotion to Fifth Grade. There is no indication concerning the content and provisions of the prior IEP document. The April 15, 2008, IEP makes mention of the use of a safe room for Student when there were episodes of "extreme disruptiveness for others in various school environments." (Res. Ex. 5, p 3 (narrative description)). The student's Fourth Grade Special Education teacher testified that the safe room was used primarily when Student was being loud, making noises, or acting out in other ways. (Tr. 2, p. 95). It was also apparently used when the student asked to go there. (Tr.2, p 94). Student's Fourth Grade aide also testified that frequently his math work was done in the special education classroom, rather than the regular education room. (Tr. 2, pp 114-116). However, the evidence did not lend itself to an exact calculation of the number of hours or days that he was out of the regular education classroom.

The suspension record reveals that Student received out-of-school suspensions twice that year, for a total of three days out-of-school. (Res. Ex. 33).

Student was actually kept in school extra hours during the Fourth Grade year as part of an effort to keep him academically current though the use of 1:1 tutoring services by his special education teacher and an aide. A total of 34.5 extra hours of instruction were given to him, in after school tutoring. (Res. Ex. 1, pp 1-6; and Testimony of Special Education teacher at Tr. 2, pp 44-47).

Although Student was not in the company of his classmates during these hours, the program did not diminish his time in the regular education environment, but rather was supplementary to it.

These findings do not support a finding that Student was, in any way, excessively excluded from school during his Fourth Grade year.

Fifth Grade Year:

The First IEP Amendment of 9/26/08

During the Fifth Grade year, August 2008 to June 2009, exclusion from the regular education environment increased and took two different forms over three different IEP amendments. Following an IEP meeting on September 26, 2008, Student's prior IEP, dated April15, 2008, was amended. Pursuant to this September 26, 2008 amendment, Student was to be assigned to his safe room from school's commencement at 8:00 a.m. until 11:00 a.m. each day. Res. Ex. 8. This continued until his IEP was again modified on October 30, 2008. Res. Ex. 9. The obvious issue raised here is whether Student's assignment to the safe room, rather than the regular classroom, for three hours per school day was the least restrictive environment for him, particularly where his IEP still called for 90% of his school time in general education. Consequently, I will deal with this exclusion from the classroom in the discussion of Issue 7, below, regarding education in the Least Restrictive Environment.

The Second IEP Amendment – dated 10/30/08

On October 30, 2008, the IEP team again met, and again amended the April 15, 2008 IEP. Res. Ex. 9. The apparent purpose of the meeting was to come up with strategies to induce Student to stay on task while at school so he would complete his school work. Multiple disciplinary incidents and failures to do his school work had transpired. *See* Finding of Fact (hereafter "FOF") No. 24. The plan documented there provides that Student will be allowed to go home from school early, each day, if he completes his work and behaves appropriately, he was allowed to be picked up early. Student had been having persistent problems staying on task, and had not been completing

his work in class. He had also been exhibiting disruptive, defiant and violent behavior directed at school property and staff. *See* FOF No. 24. The worst of these aggressive incidents, on October 22, 2008, went on for 3 ½ hours. (Res. Ex. 41, p13).

It had been previously noted in the Positive Behavior Support Plan of April 20, 2008, that Student preferred to be at home instead of staying at school, (Res. Ex. 4, p 1), under the heading "challenges." So it was thought by the IEP Team that early dismissal would be used as an incentive to induce Stu dent to behave well and to encourage him to be diligent with his classroom assignments.

The IEP amendment of October 30, 2008 thus offered the reward of early release from school for cooperative actions by the student. If Student did not get his work done by noon, he was to stay at school until "the bus runs." (Res. Ex. 9).

Notably, the meeting note includes a statement that "even with ½ days [Student] has not been completing his work." A review of daily behavior reports reveals that early dismissals had already occurred nine times between October 3 and October 28, 2009. *See* FOF No. 20. (Res. Ex. 41).

These facts, taken together, lead me to conclude that even as the IEP team was implementing this early dismissal plan for Student, they were in possession of information which should have warned them that what they were implementing was unlikely to work. Further, the statement in the IEP amendment of October 30, 2008, shows they were actually doubtful that this plan could succeed. This plan was in effect until February 27, 2009 (Res. Ex. 10).

Student was given an early dismissal (i.e., before his afternoon classes) nine times between October 31, 2008 and December 3, 2008. None were granted after that. Of those nine times, on three of them he was permitted to go home in spite of unfinished work and/or disruptive behavior. *See* FOF 35, (Res. Ex. 41, pp 17-28). Further, on January 13, 2009, he was not sent home early in

spite of apparently meeting the conditions. On that occasion, he did have behavioral problems and refused to work then after lunch. (Res. 41, pp 42).

This demonstrates that the early dismissals were not used in a consistent manner so as to be an effective behavior management technique. However, the issue at hand is not whether the attempt was actually effective, but whether the amount of time that this early dismissal policy caused him to miss from school resulted in an educational detriment to him. 20 U.S.C. §1415(f)(3)(E)(ii).

IDEA's purpose is, in part, to assure disabled children's their "access to the general education curriculum in the regular classroom to the maximum extent possible." 20 U.S.C. §1401(c)(5)(A). This would seem to encompass eligible children being able to attend school for the same hours and days as their non-disabled peers. He was out of school early, nine times, for approximately 2.5 hours a day, or a total of 22.5 hours. Unquestionably, the IEP Team, as a whole, agreed to this arrangement. Also unquestioned is that for the hours when he was out due to early dismissal, he had no access at all to the school environment. Since these lost hours were part of a greater loss of time in the school environment occasioned by the next change in the IEP (*i.e.,* on February 27, 2009), it is virtually impossible to attribute academic decline to a particular set of lost time. Rather, it is the cumulative effect of all time lost which must be determined. However, as will be discussed below. Student did suffer measurable academic detriment from his loss of instructional time during the 2008-2009 year.

Third IEP Amendment of 2/27/09

In late January and February 2009, his behavior became completely unmanageable, culminating in February 24, 2009, with him head butting his aide in the chin. *See* FOF No. 26. Also (Res. Ex. 41). He was suspended for this action for a period of three days. (Res. Ex. 33).

On February 27, 2009, an IEP team meeting was held at which it was decided that school was "overwhelming" for Student at this time and that he should only come to school for half days two days per week to be supplemented with four hours of homebound teaching services per week. (Res. Ex. 10, p. 1). It is uncontested that it was the Student's father who initially proposed this arrangement, but it was the IEP Team who approved it. This amendment was implemented and carried out for the remainder of the school year, ending June 2, 2009. (Res. Ex. 10).

A number of things trouble me greatly about this change to Student's plan. While it is not contested that Student's father was in favor of this at the time, the actions of the IEP Team cannot be reconciled with the law of the land. Nothing in the IDEA requires an IEP Team to implement a parental request if it is not consistent with the Act, other lawful requirements, or the needs of the student.[5] In West Virginia, students between 6 and 16 years of age are required legally to attend school. W.Va. Code §18-8-1(a). An exemption to the requirement of school attendance is provided for students due to physical or mental incapacity, but in such a case, the written statement of a licensed physician or authorized school nurse is required. W.Va. Code §18-8-1. There is no medical or psychological justification in the evidentiary file for the decision to exempt Student from the regular five day per week schedule of the public schools for the hours prescribed for all students. West Virginia schools are required to set their calendars so that 180 days of instruction are possible. *See* W.Va. Code §18-5-45(b)(5). With the implementation of these shortened attendance plans for Student, the possibility of getting 180 days of instruction, or anything even close to that, were extinguished. The IEP Team also does not appear to have considered any less restrictive environment for Student to address his condition of being "overwhelmed."

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[5]Notably, the Parent made a written request on September 26, 2008, for the same private placement at LEA expense that is requested in the hearing. The IEP Team had no difficulty refusing that request. (Res. Ex. 8).

Truthfully, I do not know how to characterize an exclusion from school for being "overwhelmed," and the record does not educate me, but given the evidence at hand, it is not a justified documented medical or psychiatric exclusion.

For reasons which are not explained by the record, Student apparently did not attend school at all between February 24, 2009 and March 17, 2009, as there are no daily notes for those intervening dates and a note on March 18, 2009, reports the writer's gladness at having Student back at school. (Res. Ex. 41, p 64). There are only 19 daily behavior reports between March 17, 2009 and June 2, 2009 when school ended. I count 53 regular school days in this time frame. The 19 days he attended were only for four hours each, so that even when he went to school, he was still shorted 2.75 hours per day. Student also lost out on 34 full days of instruction. He received 38 hours of tutoring completely outside the school to compensate for this. (Res. Ex. 7). The 19 short days deprived him of 52.25 hours of school. The 34 days lost cost him 229.5 hours of school time.

Student's Loss of Educational Benefit

All this time the student's IEP of April 15, 2008, (Res. Ex. 5) was in place, the amendments of September26, 2008, October 30, 2008, and February 27, 2009, never expressly superceding it. It was still calling for 90% general education environment and 10% special education environment. Under the continuum of services, a home placement is more restrictive than a special education class or a special education day school. The plan of February 27, 2009, is fundamentally at odds with the original IEP and the placement provisions therein. (Res. Ex. 5, p. 9). Also, there is no indication that Student was getting the 300 minutes (i.e., 5 hours) of Special Education Social Skills training per week mandated by the April 15, 2008, IEP, but if so, given that he was only going to school eight hours a week, that would reduce him to three total hours a week of in-school academic instruction. Clearly, something was sacrificed.

The School's position that this represented FAPE becomes even more unsustainable when the next IEP is viewed. This document dated April 7, 2009 was produced while Student was in the middle of his abbreviated school week schedule, pursuant to the February 27, 2009, IEP amendment. It again indicates Student's placement as 90% general education and 10% special education qualifying Student as "General Education: Full time 80% or more." (Res. Ex. 11, p. 8), and requiring 300 minutes of social skills services per week. Evidently, the IEP team intended for these IEP provisions to be in effect for the duration of the year. Still, Student continued with his two half days per week, plus four hours tutoring until June 2, 2009. (Res. Ex. 7, and Res. Ex. 41, pp 70-84).

In light of all the above, it is my conclusion that Student was deprived of 22.5 hours of in-school instruction during the time period of October 30, 2008, to February 27, 2009, and also deprived of 34 additional days of in-school instruction due to his schedule between February 27, 2009, and June 2, 2009. All of these exclusions of Student from the school represent a denial of access to the educational environment, without any objective demonstration or documentation of the need for his exclusion. Assuming a 6.75 hour regular school day, 34 full days equals 229.5 hours, plus 52.25 for the half days equals 281.75, which added to the 22.5 hours for the early dismissal days equals a total of 304.25 hours of in school instruction which Student was denied, in violation of the IEP documents of April 15, 2008, in force at the time. (Res. Ex.'s 5 and 11). Allowing credit for the 38 hours of academic tutoring still yields a deficit of 266.25 hours of instruction.

In order for Student to be entitled to relief for a procedural violation of his FAPE rights, it must be shown that a substantive loss occurred as a consequence of the procedural violation. The procedural inadequacies must either: (1) impede the child's right to a FAPE, (2) impede the parents' opportunity to participate in the decision-making process, or (3) cause a deprivation of educational

benefits. *See* 20 U.S.C. §1415(f)(3)(E)(ii). In this factual setting, I conclude that two of these three possibilities are present.

The enactment of an IEP which called for Student to have no access to the classroom, or even the school building, for three out of every five school days, without compelling documentary evidence is, I believe, a denial of FAPE *per se*. *Rowley*, *supra*, assumes access as a starting point. Here he was out of school more than he was in it.

Secondly, I conclude that the documentary evidence in this case supports the conclusion that Student was negatively impacted in his academic achievement. Specifically, from the Fourth Grade to the Fifth Grade, Student's grades fell significantly in the critical areas of Reading (C to a D-), Language (B to a C-), and Spelling (A to a D) (Res. Ex. 30, FOF No.52). He also went from an "A" to an "F" in Health. Social Studies went from a "B" to a "D." Arithmetic declined from Satisfactory to Unsatisfactory.

His Fifth Grade Westest scores also significantly declined from their Fourth Grade levels. In Math, he declined from 640 points to 577. Reading slid from 643 points to 401. His Science score declined from 660 points to 557, and Social Studies also slipped from 637 points to 424.

Overall, this represents a wholesale slide from his Fourth Grade performance levels of three subjects at the mastery level and one above mastery, to having three subjects below mastery and only one (Social Studies) still in the mastery category, and that with a score 213 points lower than the previous year's.

These declines in both grades earned and Westest proficiency levels achieved leads me to conclude that Student suffered an actual, verified deprivation of educational benefit in his Fifth Grade years. This satisfies the requirement for a substantive loss, set out at 20 U.S.C. §1415(f)(3)(E)(ii), which is prerequisite to the granting of relief for a violation of FAPE.

For all of the above-stated reasons, this is a denial of FAPE and Compensatory Education should be provided.

Sixth Grade. On May 5, 2009, an IEP was drafted for 6th Grade, and the change to the middle school campus. (Res. Ex. 12). That IEP calls for a General Education Environment 70% of the time and Special Education 30% of the time. (Res. Ex. 12, p 10). Yet the notes attached state "2 days school - 3 days homebound - he does better when he is on this schedule." (Res. Ex. 12, p 11). This was the schedule he was on when this new IEP was drafted. No explanation is given for the IEP Team's decision to shift back from the two half days/week, plus four hours tutoring schedule, to the full time schedule Student was expected to attend beginning in August 2009. The question is this: If school was overwhelming to him from February 27, 2009 to June 2, 2009, why did it suddenly cease to be so at the beginning of the 2009-2010 school year? The question remains unanswered.

In any event, Student began his 6th Grade year in August 2009, attending the same hours and days as the general population. On October 14, 2009 and October 16, 2009, two episodes of misbehavior occurred which resulted in officially documented suspensions of one day each. (Res. Ex. 32 and 33). This is not the entire story, however. At the time of the second disciplinary violation on October 16, 2009, the school's Vice Principal gave to the petitioner a document titled "Student Discipline Referral." (Pet. Ex. 30). In that document it is indicated that as of October 16, 2009, Student has an out-of-school suspension "until further notice." It also states "Out-of-school setting until/unless revised IEP plan is developed and implemented." It is signed by the school's Vice Principal. (Pet. Ex. 30). The Vice Principal admitted that homebound placement was discussed with Student's mother, (Tr. 3, p 231, L 13-18). Student's mother indicated her understanding that Student was to be out of school until crisis intervention was in place or an IEP

meeting was held. (Tr.1, p 230). Student's mother also testified that the Vice Principal offered homebound instruction. (Tr. 1, p 231). This was further supported by the school psychologist report of October 30, 2009,which indicated that sometime in October, before the assessment date of October 23, 2009,[6] Student had been "placed on homebound instruction." (Res. Ex. 16, p 1, ("Background Information," 3rd paragraph).

Testimony of Student's father stated that "There was a time when [the Vice Principal] said 'do not send him,' and also there was a time where I felt it necessary that [Student] not go to school. (Tr.1, p 135). The specific dates that these two approaches were taken were not identified by him. Therefore, this testimony is not inconsistent with a finding that the October 19 - October 29, 2009, absences reflected in the LEA's student attendance record (Res. Ex. 32, p 2), were occasioned by the actions and directions of the school personnel. Further, the attendance record shows that Student's absences end for a time, as of November 3, 2009, (i.e., November 2, 2009, is the last in a series of school days absences which were consecutive from Monday, October 19, 2009, through Thursday, October 29, 2009, and once more on Monday, November 2, 2009. There is no indication whether Student attended on October 30, 2009, or not). However, an IEP meeting was held on Tuesday, November 3, 2009, and on the notes of that meeting, the Vice Principal wrote "[Student] will return to school on Monday, November 9, [2009]." (Res. Ex. 20, p. 3 of 4). This comment makes no sense

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[6]Respondents assert that Student was in class on October 23, 2009, however it is clear from the school psychologist's report that Student was with her being tested that day, that he was on homebound and that he was not attending school, in his own words, because he was "bad." (Res. Ex. 16, p 1). The sign-out sheet for that day indicates that Student was picked up at 1:00 when Student was "finished testing." (Res. Ex. 34, p 58). The psychologist's report at "Observations during testing" reveals that Student was with her for 1 ½ hours before lunch, and for lunch, 30 minutes after lunch, and then for additional time thereafter while the psychologist continued the testing and assessment process. (Res. Ex. 16). The testing process thus appears to have taken the whole day up to 1:00 p.m. The attendance record also reflects he was counted as absent from school that day. (Res. Ex. 32, p 2).

unless the school personnel intended for Student to be out of school until that date, or at least gave their tacit approval.

If I take at face value the Vice Principal's representations that she re-coded Student's absences on the attendance records to reflect a Health Exclusion so that Student's Parents would be shielded from any charge of violating the truancy laws (Tr. 3, pp 226-228, 229-230), there is, at best, an abdication of responsibility by the school's Vice Principal to make sure Student comes to school. If the absences were excusable as medically necessary, documentation from a physician should have been requested. By her own testimony, she indicated the attendance record had been altered and was not accurate. This Vice Principal also testified at hearing inconsistently concerning Student's absences from October 16 to November 11, 2009, that she did not know why Student was out (Tr. 3, at pp 229, L 4-8) and, also that she "[knew] that these were medical concerns." (Tr. 3, p 230, L 3-5). Again, there are no documents from medical care givers indicating a medically-based reason for any of the October to November 2009 absences.

Student did return to school on November 3, 2009, the same date as the provisional IEP revision of November 3, 2009, submitted under the signature of the Vice Principal. Res. Ex. 20, p 2. The student's return to class on November 3, 2009, also satisfied the stated requirement of the Student Disciplinary referral of October 16, 2009. It stated Student "was to be out of school setting until/unless revised IEP plan is developed." (Pet. Ex. 30). The actions of the student exactly followed the written statement previously authored by the Vice Principal on October 16, 2009. Whether the days out were a suspension or a home-bound placement are immaterial. Either way, they were an exclusion from the school environment at the school's behest, due to the behavioral problems that were occurring in the school. I am convinced that these were the conditions which

the Vice Principal originally directed to the student's Parents, and the ultimate reason that Student was out of school between October 16, 2009, and October 29, 2009.

This represents 10 school days, and adding in the suspension on October 14, 2009, brings the total to 11. A suspension of 10 or more days, or a cumulative series of suspensions that add up to 10 or more days in total length constitutes a change of placement. 20 U.S.C. §1415(k) and 34 C.F.R. §300.536(a). When a change of placement occurs due to a child's violation of a code of student conduct, as happened here, the LEA is charged with the duty to conduct a manifestation determination to decide:

> " (i) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."
>
> 20 U.S.C. §1415(k)(1)(E)(i) and (ii).

In the event one or the other of these conditions is found to exist, then "the conduct shall be determined to be a manifestation of the child's disability." 20 U.S.C. §1415(k)(1)(E)(ii). In that event, the IEP committee must either conduct an FBA and implement a behavior intervention plan (BIP), or, if a BIP already exists review it and modify it as necessary. The child is then to be sent back to his prior placement unless the team agrees otherwise. 20 U.S.C. §1415(k)(1)(F).

In this case, an IEP meeting was held on November 3, 2009, rather than a manifestation hearing, consequently no determination was made on the question of whether Student's unruly behaviors are, or are not, manifestations of his disability(s). However, on the day of that meeting, the IEP team did obtain parental permission to evaluate Student via an FBA and an Occupational Therapy Sensory Evaluation. The FBA was completed by two special education personnel in the

LEA's employ. (Tr. 4, pp 145, 149). A positive behavior plan, dated January 4, 2010, has also been created in draft form, but has never been presented to an IEP team.[7] (Tr. 4, p 149).

Although a manifestation hearing was never conducted here, the student has received a functional behavioral assessment, and a draft Behavioral Intervention Plan awaits review. On the same day the FBA was written, December 14, 2009, the LEA sent notice to the Parents of an IEP meeting for the purpose of reviewing the FBA and BIP, scheduled for December 23, 2009. It was never signed by the Parents. (Res. Ex. 23, p 1). Subsequently, on December 28, 2009, a second notice was sent to the Parents for a rescheduled IEP meting to be held on January 5, 2010, for the same purpose. It, likewise, was never signed by the Parents.[8]

Substantively, the Parents have been offered by the school district what they are entitled to under the disciplinary manifestation provisions of IDEA. 20 U.S.C. §1415(k)(1)(e) and (f). That is an FBA and a BIP. Consequently, any deficiencies in the procedures by which it was obtained are not grounds for a request for relief.

The Parents have expressed dissatisfaction with the offered FBA and BIP on the grounds that they believe the evaluators are persons who have long worked with Student and who have no new ideas to offer now. The Parents' Advocate, in her post-hearing brief, alleges that the FBA is deficient in a host of ways. Neither party introduced expert testimony regarding what a proper FBA ought to include. Neither were the LEA's agency criteria for FBAs disclosed.

A review of the proposed BIP reflects some approaches that have not been tried and discussed in this hearing, those being a call for smaller class settings, self monitoring of disruptions

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[7]The request for hearing in this matter was filed on December 22, 2009, eight days after the FBA's date, so the draft BIP was created during the pendency of this case.

[8]Petitioners filed for due process on December 22, 2009. The Complaint was actually written on December 17, 2009.

and putting an increased emphasis on peer interactions. (Res. Ex. 24, p 2). "General interventions," 3 and 4. As to the technical deficiencies the Parent alleges concerning this FBA, I have been offered no evidentiary yardstick against which to measure this document. Having put forth evidence that an FBA was done via a collaboration between their Special Education Specialist and a Special Education Teacher, who are persons trained and qualified to do such assessments, the LEA has carried their burden of proving that a legally adequate FBA has been performed. Without further expert testimony or an indication of the agency standards for FBA's, I have no basis on which to find this FBA to be inadequate as a matter of law.

Nonetheless, Parents generally have the right to an independent educational evaluation at public expense if the Parent disagrees with an evaluation obtained by the public agency . . " 34 CFR §300.502(b)(1). By means of Issue 4 herein, the Parents have challenged the appropriateness of the FBA which was done.

In dicta, our highest court has suggested their opinion is that the IDEA anticipates the liberal availability of IEE's as a means of leveling the playing field between Parents and LEA's in due process hearings. *Schaffer v. Weast*, 546 U.S. 49, 60, 126 S. Ct. 528, ___ (2008).

Where parents challenge an evaluation performed by an LEA and request an IEE the LEA must either comply or file for due process to demonstrate their evaluation is appropriate. See Conclusion of Law (hereafter COL) No. 1.

Although testimony of the FBA preparers was offered, they did not identify the agency standards for such assessments. Therefore, their testimony has no context for deciding it if complies with agency standards. Therefore they have not demonstrated it to be appropriate. Given the extreme nature of Student's outbursts and the increasing frequency of violence against staff and property, I believe it is imperative that effective measures be found to modify his behavior at school

to comply with social norms. I conclude that the Parent's request for an FBA which is comprehensive and data based is reasonable and necessary at this time, particularly where the LEA has not demonstrated that the FBA, as prepared in accordance with agency criteria. Consequently, the LEA will be directed to provide the means for the Parents to obtain an FBA, by an independent private evaluator at public expense not because FAPE was denied here but rather because Parents have successfully challenged the appropriateness of the FBA which was provided. (See Discussion of Issue 4 below).

Unfortunately, the student's actions in October 2009, which precipitated the foregoing series of actions, were not the end of his disciplinary problems this year. He committed a number of acts violative of school behavior polices on November 19, 2009, November 30, 2009, December 4, 2009, and December 9, 2009, for which he received, in order, a one-day out-of-school suspension, a referral to the IEP Team, a one-day in-school suspension and a three-day out-of-school suspension. (FOF No. 34 and Res. Ex. 33, pp 1-5).

His offenses ran the gamut of obscene language, hitting staff including the Vice Principal., spitting on aides and teachers, throwing tennis balls at his aide, running away from staff, going off school property to his mother's place of work, beating and kicking furniture, screaming, growling, turning over chairs and desks, pushing and striking an aide even while multiple staff members and a Sheriff's Deputy tried to stop him. (Res. Ex. 33, pp 2-5).

Prior to these incidents between November 19 and December 9, 2009, the IEP meeting of November 3, 2009, had taken place and efforts towards obtaining an FBA were already underway, as was the O.T. Sensory Evaluation which was completed on January 5, 2010 (Res. Ex. 25). Consequently, Student was already receiving the benefit of the same actions as would have been

taken had a manifestation hearing been held and determined in his favor. So as to these later disciplinary actions, there is no substantive deprivation, and therefore no denial of FAPE.

Issue Two

WHETHER STUDENT'S RIGHTS TO A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) WERE DENIED BY THE SCHOOL DISTRICT'S FAILURE TO PROVIDE APPROPRIATE STAFF FOR STUDENT'S INSTRUCTION, SOMETIMES PROVIDING AIDES INSTEAD OF A QUALIFIED TEACHER, AND SOMETIMES SENDING STUDENT HOME BECAUSE OF INSUFFICIENT STAFF?

The testimony of both the Special Education teachers and the aides who provided services to Student from his Fourth Grade career to the present, unanimously indicated that the teachers, Regular Education or Special Education, were the source for the lesson plans and daily assignments. While aides frequently helped him with his work and even made ad hoc modifications to his assignments, this was done under the daily review and supervision of a certified teacher. Student had at least one Reg. Ed. Teacher and one Special Ed. Teacher assigned to him each year.

Petitioner directs me to no specific legal reference in support of the claim that these actions violate Student's rights in any way.

The second claim, herein, that Student was sent home because of insufficient staff, is not factually supported in the record.

No violation is found in regard to this claim, and no relief is due.

Issue Three

WHETHER STUDENT'S RIGHTS TO A FAPE WERE DENIED WHEN THE RESULTS AND RECOMMENDATIONS OF THE MOST RECENT OCCUPATIONAL THERAPY EVALUATION WERE NOT INCORPORATED INTO THE STUDENT'S LAST IEP?

The most recent Occupational Therapy report completed prior to the petitioners' complaint was written on January 11, 2007.[9] (Pet. Ex. 29).

The Occupational Therapist testified that various of the recommendations she had suggested had been tried, and had failed to help Student. Thus, it would not have been appropriate to include them in subsequent IEP's. Student did, in fact, receive Occupational Therapy services, pursuant to his IEP of April 15, 2008. (Res. Ex. 5, p. 7). Occupational Therapy services were terminated as of October 30, 2008 because he had met his Occupational Therapy goals. (Res. Ex. 25, p. 1 and Res. Ex. 9), which concerned skills getting his thoughts onto paper. (Res. Ex. 25, p 1).

Under the treatment plan of April 2008, for the time period of April 15, 2008, to April 2009, the IEP Team gave Student 30 minutes per week instruction in touch typing skills, the use of an Alpha Smart device for spelling and reading assignments, and improving the legibility of his handwriting. (Res. Ex. 42).

The Therapist, who works under contract for the LEA, testified that she had found the school receptive to her recommendations and could think of no recommendation she had made that had not been accepted. (Tr. 3, p 191, L 17 to p 192, L 4).

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[9]The document bears a 2006 date on the front page, and 2007 date internally. Testimony of the Occupational Therapist confirmed that the 2007 date on the internal pages was correct. (Tr. 3, p 164, L 16-18).

I found no evidence in the record which indicates Student requires a specific Occupational Therapy service which he has not received.

Issue Four

WHETHER AN APPROPRIATE FUNCTIONAL BEHAVIORAL ASSESSMENT HAS BEEN COMPLETED FOR STUDENT, AND WHETHER APPROPRIATE BEHAVIORAL INTERVENTIONS HAVE BEEN IMPLEMENTED FOR STUDENT, AS REQUESTED BY THE PARENTS?

This issue was discussed at some length under the discussion concerning Student's Sixth Grade year contained in the Discussion of Issue One.

As indicated there, an FBA was actually performed and reduced to writing as of December 14, 2009. My impression of that FBA is that it was neither created using all available data, nor using rigorous methods. On it's face, input from the Parents and observation from the home setting are absent, Student's physicians were not consulted, with the exception of a reinforcer inventory no objective, quantifiable data was collected. Background information was in the form of informal interviews of Student's current teachers, aide, and Vice Principal which are, I believe subject to subjective bias. The only data collected concerned visual/unquantified observations of Student in several school settings, and a reinforcer inventory which apparently relies on the Student's self report of things that he prefers and which motivate him. (Res. Ex. 22, pp 1 and 2).

Petitioners supplied no expert witness to explain or define what an FBA should contain, nor have agency standards for an FBA provided. Therefore, I have no standard against which to measure it and cannot find it inadequate as a matter of law.

However, as previously discussed in Issue One, Parents have an initial statutory right (*i.e.*, not dependent on the results of a due process hearing ruling) to obtain an Independent Educational

Evaluation at public expense. By means of this issue, the Parents have raised concerns about the comprehensiveness of this FBA at this Due Process Hearing. On November 13, 2009, the Parents requested the FBA be performed by a particular individual employed by Marshall University, but the LEA was not able to procure his services. The issues filed on behalf of Petitioner on the January 13, 2010, telephone conference made clear that they wanted an FBA performed by someone not employed by the LEA. The School Board's employees who performed the FBA both testified at trial as to the FBA which was produced, yet did not provide expert testimony or agency criteria regarding all the components which must be in an FBA. Where parents want their own evaluations performed, after they disagree with a report furnished by the LEA, the statutorily imposed duty then falls upon the LEA to file for a due process hearing to demonstrate the appropriateness of its evaluation or proceed to provide the IEE to the Parents. 34 C.F.R. §300.502(b)(2), authorized by 20 U.S.C. §1415(d)(2)(A). While the FBA performed and testified to is adequate to prove that an FBA was created, the quality and comprehensiveness of it have not been demonstrated. Therefore it has not been shown to be "appropriate."

The U.S. Supreme Court, *in dicta*, has also suggested that it is that court's opinion that IEE's should be liberally available to Parents, and that such evaluations are the means to level the playing field between the greater expertise of the school's personnel and the Parents' status as lay persons. See *Schaffer v. Weast*, 546 U.S. 49, 60 126 S. Ct. 528, ___)(2005).

For the reasons discussed above, the Parents should be given the opportunity to obtain an Independent Educational Evaluation at the LEA's expense.

Issue Five.

WHETHER STUDENT'S CURRENT IEP, WHICH REQUIRES "CONSISTENT ADULT SUPERVISION," IS ADEQUATE OR WHETHER STUDENT REQUIRES A "ON-ON-ONE AIDE" TO BE WRITTEN INTO THE IEP AS REQUESTED BY STUDENT'S PARENTS?

The issue, as presented, concerns whether consistent adult supervision is adequate or whether, alternatively, a one-on-one aide dedicated to Student's use/service, is needed, and should be included in his IEP.

No less than five supervisory aides testified at hearing that they provided services to Student over the past two years (three academic years). *(See generally*, Tr. 2, pp 111, 183, 291, 204; and Tr.3, p 110).

Student's most recent finalized IEP dated October 1, 2009, calls for "behavior management adult assistance" in the General Education Environment (GEE). Pursuant to the same IEP, only one of his classes is provided in a GEE, that being Science. (Res. Ex. 14). One of his Sixth Grade teachers, certified in Special Education, testified that he co-taught that GEE Science class, and that it is a collaborative Special Ed/General Ed inclusion class. (Tr. 3, p 104).

The Sixth Grade Vice Principal testified that aides in her school are not committed to a particular student, and further that Special Education teachers could be used to fulfill this student's supervision needs pursuant to the terms of his IEP, for those times he is in Special Education classes. (Tr. 3, p 196, L 16-p 197, L 15 and p 198, L 12-18).

Time he is out of any class with a Special Education teacher present, he would still be provided an aide. These would be before school, 3rd period (focus time), 6th period (refocus time), 9th period (Art), and 10th period (flex) as well as his 5th period lunch time. (Pet. Ex. 17).

Student has an aide this academic year who helps him during the day, but she is not committed to serving him exclusively. Tr. 3, p 197, L16 – p 198, L 4). The evidentiary record does not demonstrate any void in his educational plan or any needed services left unprovided due to the lack of a one-on-one aide.

The Parents testified to events which purportedly occurred in the hallways and on the bus which they believed showed he was bullied at school. Those events were undocumented and further, the Parents were testifying concerning events they clearly were not present to observe. It is clear that the presence or availability of an aide has not, in the past, solved the Student's persistent refusal to do school work, nor have the various aides been able to prevent his worst outbursts. Indeed, aides seem to frequently be targets of his violence and aggression. (Res. Ex. 41, pp 60, 61, 63, 69, 81; Res. Ex. 33, p. 5, 4, 3, 2; Tr. 3, p 132, L 14-15).

The argument advanced on behalf of the Petitioner, in his post-hearing brief goes to the certification of various classifications of aides and intimates that it is the classification/category of the aide provided which is of true concern to him, rather than the constant presence of a dedicated aide.

As stated by the Advocate, "Because [Student] has received instruction from a large number of aides, it is important that those aides be certified to deliver the services that [Student] needs. Under W. Va. Code §8-A-4-8(i)(9), only a person classified as an aide II Class title may be employed as an aide in any Special Education program."

The issues in this case were discussed and set out with finality at a telephone conference with this hearing officer, held on January 18, 2010. All the issues were discussed at some length on January 18, 2010, and the form presented at hearing is the verbatim form of the issue that the Advocate indicated she wanted to have heard.

The issue, as presented at hearing, asks whether "consistent adult supervision" is adequate or whether a "one-on-one "aide" is required. My understanding of the issue submitted for hearing was that the consistency and constancy of the supervision required by Student's needs was in question. The issue, as approved by the Advocate at the January 18, 2010, telephonic conference, would not lead a reasonable person to conclude that the qualifications of the service providers was the matter truly in contention.

I conclude, therefore, that the argument advanced on behalf of the petitioners is essentially a new issue, not presented before the hearing, on which the LEA did not have notice or opportunity to be heard. For all the reasons stated above, I find that the need for a one-on-one aide has not been demonstrated. Therefore, no relief is in order as to this issue.

Issue Six

WHETHER STUDENT HAS BEEN DENIED A FAPE BECAUSE OF THE SCHOOL DISTRICT'S FAILURE TO PROVIDE APPLIED BEHAVIORAL ANALYSIS (ABA) SERVICES TO HIM?

In the Petitioners' brief, this issue is abandoned. Therein, the Advocate states, "Petitioner's [sic] did not have the income to present an expert witness on the benefits of ABA." That is the entirety of the information/argument advanced.

Further, there was no evidence, documentary or testimonial, submitted in support of a request for ABA services.

Consequently, no relief is appropriate as to this issue.

Issue Seven

WHETHER STUDENT HAS RECEIVED SERVICES IN THE LEAST RESTRICTIVE ENVIRONMENT AS MANDATED BY THE IDEA?

Fourth Grade: The earliest IEP admitted to evidence was dated April 5, 2008, drafted in the spring of his Fourth Grade year (Res. Ex. 5). It called for the delivery of his services and classes in a General Education Environment with the exception of 30 minutes of Occupational Therapy per week as a related service. (Res. Ex. 5, p 7 of 11). The placement was General Education - Full time, 90% General Education Environment (GEE) and 10% Special Education Environment (SEE). (Res. Ex. 5, p 9 of 11). The IEP also makes mention of "safe room accommodations" required in response to "behavioral episodes that have escalated to extreme disruptiveness for others . . ." (Res. Ex. 5, p 3). His Fourth Grade Special Educator testified that the IEP Team goal that year was to keep him in regular education as much as they could. (Tr. 2, p 15, L 4-6). He was removed from the Regular Education Environment if "he was unable to complete an assignment in the Regular Education class, or if he was unsettled or was talking out of turn or something . . ." (Tr. 2, p 16). Testimony of Fourth Grade Special Education Teacher. This use was consistent with the description of the safe room use as an accommodation as mentioned in the IEP.

There was no evidence indicating excessive use of the safe room during this school year, but rather that it was used in the way described in the IEP.

Fifth Grade: In the Fifth Grade, Student entered with the above described IEP dated April 15, 2008, (Res. Ex. 5) with a GEE 90% and SEE 10% - a General Education - Full Time Placement. (Res. Ex. 5 at p 9).

On September 26, 2008, his IEP was amended. The meeting notes call for him to be in his safe room from 8:00 a.m. to 11:00 a.m., a period of three hours, daily. The problems being

addressed by the team were "behaviors and completion of assignments." (Res. Ex. 8, p 2). While in the Fourth Grade, the safe room was being used as an as-needed accommodation, but as of September 26, 2008, it becomes something more like a Special Education resource room. At three hours per day out of a total school day of 6.75 hours, the time spent in the safe room represents over 40% of the school day.[10] The amendment of September 26, 2008 thus represents a shift from a General Education - Full Time Placement (*i.e.* GEE 80% or more) to a General Education - Part Time Placement (GEE - 40% to 79%) (Res. Ex. 5, p 9). It is not disputed that Student was having significant problems with his behaviors and failing to complete his school work.

> Under IDEA, public agencies "must ensure that (to) the maximum extent appropriate, children with disabilities . . . Are educated with children who are non-disabled; and (ii) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114(a)(2) (Authorized by 20 U.S.C. §1412(a)(5).) (emphasis added).

It is also required that public agencies provide a continuum of alternative placements including regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. 34 CFR §300.115(b)(1).

West Virginia has promulgated rules on this issue in its Policy 2419. 126 W.Va. C.S.R. §126-16-3, Chapter 5, §2 J. Pursuant to this policy, resource rooms are under the provisions relative to General Education - Part Time. Thus the move to a separate classroom for over 40% of his school represents a shift to a more restrictive educational environment for this student.

In the case of *Oberti by Oberti v. Board of Education of the Borough of Clementon School District*, 995 F. 2d. 1204 (3rd Cir. 1993), that court established a two-prong test for determining when

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[10]By my calculation, it is a repeating decimal of 44.444%

a child could be removed to a more restrictive setting. *See* COL No. 16. Paraphrased, the first prong of the test comes down to an examination of the (1) efforts to accommodate the child in Regular Education; (2) the benefits of the Special Education class and (3) negative effects of keeping the child in Regular Education. The second prong, reached only if the first prong is satisfied, concerns whether, in the more restrictive environment, the child will still be in school programs with non-disabled children for the maximum extent appropriate. *See Oberti, supra* at 1217-189. This test was also adopted by the Second Circuit at *P by Mr. And Mrs. P. v. Newington Board of Education*, 546 F. 3d 111, 120, (2d Cir., 2008).

The heart of the LRE requirement is to educate children in a regular education classroom with non-disabled children as much as is appropriate with related services and supplementary aids.

Whatever label is put on the 3-hour per day safe room plan, enacted on September 26, 2008, it was not a regular education classroom. Being outside the classroom for over 40% of the day is not a General Education - Full time placement. Since the IEP in place as of April 15, 2008 called for that very placement, the IEP amendment of September 26, 2008 (Res. Ex. 8) cannot be in compliance with that IEP. The location of services is not GEE as mandated by the IEP either. Further, the September 26, 2008 amendment does not contemplate the change of placement it brings into effect. IDEA demands that LRE considerations be taken into account whenever placement is to be changed. There is no evidence that the IEP Team considered the factors set out in *Oberti* before they moved Student to this substantively more restrictive environment, or that they considered less restrictive alternatives such as an ordinary Special Education class setting. This September 26, 2008 IEP amendment, therefore violates both the then existing in force IEP and fails to consider the second prong of the *Oberti* test, that is, whether he would be educated with his non-disabled peers to the maximum extent possible. *Oberti supra* at 1218.

Similarly, the programmatic changes in the IEP amendments of October 30, 2008 and February 27, 2009, (Res. Ex's. 9 and 10) were produced without documented attention to their impact on the LRE considerations. As discussed in Issue One, concerning time spent out of school, Student was deprived of over 200 hours of school time as a direct consequence of these two changes to his educational plan. In addition, under the continuum of service provision, home services are more restrictive even than special education classes. *See* 34 C.F.R. §300.115 and Policy 2419. W.Va. C.S.R. §126-16-3 at Chapter 5, §2.J.A. For the reasons discussed above, these two amendments are violative of his then in-force IEP, and represent a change of placement without required consideration of LRE concepts.

Consequently, the removals from the Regular Education classroom occasioned by the IEP amendments of September 26, 2008, October 30, 2008, and February 27, 2009 violated Student's rights to receive his educational program in the Least Restrictive Environment. The deprivations which Student suffered from these exclusions from the classroom are discussed at Issue 1 above.

Sixth Grade: Student began the 6th Grade year in August 2009 with an IEP dated May 5, 2009. (Res. Ex. 12). It described a program with 70% GEE and 30% SEE, which qualifies as General Education - Part Time.[11] (Res. Ex. 12, p 10 of 12). That IEP is scrapped and an entirely new one drafted on October 1, 2009. (Res. Ex. 14). The narrative description on that document indicates "[S]tudent has not been successful staying in and attending school this year. He is usually so disruptive that he has to be picked up by his Parents. A behavior management plan was written to allow [Student] a safe place to go and take a break for 10 minutes. This plan was implemented but not successful." . . . It also states [Student] refuses to complete any witten [sic] work to be assessed" (Res. Ex. 14, p. 3 of 11), the Placement is noted to be General Education - Part time, and

[11]On this document, the 70% GEE/30% SEE is filled in but then the General Education - Full time box is incorrectly checked. (Res. Ex. 12, p 10 of 12).

reflects 60% GEE and 40% SEE. Four of his five academic classes are in an SEE setting and the fifth, which is Science, is in an inclusive collaborative setting. (Res. Ex. 6 and Testimony of 6th Grade History Teacher. Tr. 3, p 104).

As discussed under Issue One, disciplinary issues were prominent between October 14 and December 4, 2009. The suspension of Student for offenses on October 14 and 16, 2009 "until further notice," and subsequent absence from school for 11 days, was characterized by the school's psychologist as "homebound." There is no evidence that Student was receiving any school services during this time period. This removal of Student from the regular education classroom or special education classroom to a home environment totaling 10 days or more, is characterized by the IDEA as a change of placement even when services are being appropriately provided. 34 C.F.R. §300.536(a), 20 U.S.C. §1415(k). To ensure that such changes of placement receive appropriate consideration and intervention, the IDEA requires that a manifestation determination be made by the IEP Team. This is supposed to occur within 10 days of the decision to exclude the child from school. 34 C.F.R. §300.530.(e). Factually, Student's exclusion began on October 16, 2009. The 10th school day thereafter would fall on October 30, 2009. An IEP meeting was actually held on November 3, 2009. (Res. Ex. 20). No written notice of that meeting appears in the documentary record. No change to a more restrictive educational environment is sanctioned under the Decisions section of that document, nor are LRE considerations expressly discussed. (Res. Ex. 20 at p 2-3). By it's terms, this IEP is "not legally binding until all evaluations and assessments have been completed and findings are reviewed by the IEP Committee. (Res. Ex. 20, p 3). The FBA, subsequently ordered, was reduced to writing on December 14, 2009. (Res. Ex. 22 and Res. Ex. 24). A notice for an IEP meeting was issued that same day (Res. Ex. 23) but the Occupational Therapy Sensory Evaluation was not produced until January 5, 2010. (Res. Ex. 25).

The time period between October 16, 2009, and January 5, 2010, is approximately 11 ½ weeks. A school quarter is 9 weeks. This represents an appreciable portion of the school year. Although this due process action has intervened, it is clear that an IEP meeting to consider the placement issues under the terms of the November 3, 2009, proposed IEP relevant to Student's needs could not have occurred before January 5, 2010, because the requisite FBA and O.T. Sensory Evaluation were not yet complete. If the IEP meeting noticed on December 14, 2009, had been held as scheduled, it would have happened on the last day before the Christmas break, and would have been held without the benefit of the Occupational Therapy Sensory Evaluation.

In the intervening time between the beginning of the school exclusion and the filing of Student's due process complaint, Student had four more outbursts of unacceptable behavior, on November 19, 2009, November 30, 2009, December 4, 2009, and December 9, 2009. He received an additional four days of out-of-school suspension for these acts. (Res. Ex. 33). The November 30, 2009, offense resulted in a referral to the IEP Team.

Altogether Student has been out of school at least eleven days due to the October 14 and October 16, 2009, behavioral incidents and another four days for the four incidents ending December 9, 2009, totaling 15 days out of school. A manifestation hearing has never been held, his placement and the considerations of LRE have never been addressed.

The change of placement which arose, *de facto*, because of the 14 days of suspensions and homebound placement have not been addressed. This is a violation of his IDEA rights and leads me to the conclusion that a change of placement from "General Education - Part time" to "Out of School Environment" occurred " without appropriate and timely IEP consideration," which is also a violation of his LRE rights. However, the record is devoid of any information showing his current

levels of achievement. It is therefore not possible to determine what, if any, substantive detriment has been vested on Student due to this procedural violation.

The Remedy Requested and Summary of Findings

The remedy sought by the Petitioner, on behalf of Student, is compensatory relief in the form of Student's placement in a private school for autistic students, located in the State of Virginia. The law is clear that before a private school placement at public expense may be ordered, three separate conditions must be demonstrated.

(1) That the educational program and placement offered to the student failed to provide a Free Appropriate Public Education;

(2) That the proposed private placement would provide the student a FAPE; and

(3) That the costs associated with the private placement are reasonable, consistent with the principals of equity.

See *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L.Ed. 2d 385, ___ (1985) and *Florence County District Four v. Carter*, 510 U.S. 7, 16, 114 S. Ct. 361, 366, 126 L.Ed. 2d 284, ___ (1993).

In this decision, it is my finding that Student's placement in an isolated classroom setting for three hours per day, pursuant to an IEP partial amendment of September 26, 2008, was inconsistent with the IEP then in place and represented a more restrictive environment than mandated by the original annual IEP of April 15, 2008.

It was also my conclusion that early dismissals pursuant to an IEP partial amendment of October 1, 2008, and homebound placements three days per week pursuant to an IEP amendment of February 27, 2009, represented removals from the classroom, and into a home setting for periods

of time when his non-disabled peers went to school, in violation of the stated legislative purpose of the IDEA. 20 U.S.C. § 1401(c)(5)(A).

Since a home setting is a more restrictive setting than either a regular education or a special education classroom, those other less restrictive options should have been considered and the placement for his IEP re-determined at the time of the amendments. While those actions violated FAPE procedurally, they also substantively caused his grades to fall and his Westest scores to decline in the Fifth Grade.

At this time, Student is in the Sixth Grade. His present IEP document dated October 1, 2009, (Res. Ex. 14) has not been found to violate IDEA. Any violations found as to this academic year concerned removals from school subject to disciplinary actions, and *de facto* changes of placement occasioned by statutory construction of removals for over 10 days duration. There is no finding that the IEP document of October 1, 2009, is deficient, rather the finding is that the IEP document of October 1, 2009, wasn't followed as to its placement directives; a homebound placement being more restrictive than either the regular education settings or special education settings called for in the "Regular Education - Part Time" (GEE 60% - SEE 40%) placement (Res. Ex. 14, p 9 of 11).

While this qualifies as a finding that the educational program or placement in the Fifth Grade, and part of the Sixth Grade, violated his right to FAPE, it satisfies only the first prong of the three prong test set out in *Burlington*, *supra*, and *Carter*, *supra*.

No expert appeared, nor did any employee of the proposed private school appear to give testimony regarding the appropriateness of the private school's program. Neither did any admitted document describe it. The costs were not revealed. There is a complete lack of evidence on these two critical issues. Without the necessary facts being established, the requested compensatory relief in the form of a private school placement cannot be lawfully ordered.

However, the deprivations of FAPE described herein, keeping Student out of the classroom, placing him in placements more restrictive than those called for in his IEP, and the resulting measurable academic decline should be addressed.

Hearing Officers have powers commensurate with those of a reviewing court to award relief. *Cocores v. Portsmouth New Hampshire School District*, 779 F. Supp. 203, 205 (D. N.H. 1991).

The IDEA allows a hearing officer to fashion an appropriate remedy, and compensatory education is an available option under the Act to make up for a denial of FAPE. *P. by Mr. And Mrs. P. v. Newington Board of Education*, 546 F.3d 111, 123 (2d Cir. 2008). In determining the appropriate compensatory relief, a qualitative rather than merely quantitative standard should be used. The Hearing Officer should look at what deficiencies have been caused by the denial of FAPE and craft relief which fits the loss. *See Reid v. District of Columbia*, 401 F.3d 516, __ (D.C. Circuit 2005).

Examining the nature of the losses incurred and the deficiencies that resulted, reveals the following:

(1) In his 5th Grade year, and during the suspension/homebound placement in his 6th Grade year Student lost many days of instruction in the company of his non-disabled peers.

- The losses from such a deprivation are subtle and have not been delineated with specificity in this case. Student's father indicated that he was more immature in his behavior than other children his age. No opportunity to observe and model the behavior of his non-disabled peers presented itself during the more than 34 days he was excluded from the classroom during the Fifth Grade year and the fifteen days he was excluded from the classroom

during the Sixth Grade year. The emphasis in the IDEA placed on the inclusion of students with non-disabled students, to the maximum extent appropriate, 34 CFR § 300, 114(a)(2), 20 U.S.C. § 1412(a)(5), underscores the very strong presumption in the law that inappropriate separation of a student from his non-disabled peers is a loss in itself.

- The second loss Student suffered is the across-the-board slide downwards in his grades and the significant decline in his Westest achievement scores, which were indicative of diminished academic achievement. Student has received intellectual testing which seems to indicate he has at least average intelligence. His grades in the Fourth Grade were quite good. An appropriate remedy would diagnose and define this academic loss and provide compensatory education to redress them.
- The violations of FAPE here have all been caused ultimately by an underlying inability to manage Student's work habits, inappropriate classroom disruptions, and his aggressive, sometimes violent, behavior. Through the past seven IEP's and amendments drafted between April 15, 2008 and October 1, 2009, the LEA has been unable to find a behavior management plan that works. The Parents have voiced their disagreement with the FBA of December 14, 2009, both in its method of development and in their confidence in the personnel who created it. As discussed in Issue Four above, Parents who disagree with evaluations produced by, or for, an LEA, have the right to an IEE. The Parent's concerns about it are not trivial. While there is no criteria offered here by which the LEA's offered FBA could

be found to be legally inadequate, the statutory right to an IEE presumes the Parents right to an IEE unless the LEA objects and affirmatively demonstrates the appropriateness of its evaluation. 34 C.F.R. § 300.502(b)(1) and (2). The LEA has not provided any criteria by which I can measure the FBA of December 14, 2009, and find it to be appropriate. Consequently, the Parents should be permitted an FBA by an independent evaluation pursuant to 34 CFR §300.502(a). This independently obtained FBA should then be considered in the creation of a BIP.

- Another damage which I believe Student has suffered, is that he has learned the lesson that inappropriate behavior will get him out of school. The only remedy for this is to begin now to change the consequences for his inappropriate conduct, so that he will be rewarded only for good behavior, and that bad behavior will result in consequences that do not reinforce its repetition. Again, this goes back to the need for an FBA and an appropriate BIP.

Given these damages, and in the circumstances of this case, the following relief is ordered:

To address the decline in academic achievement, Student's current levels of performance should be assessed in the foundational subjects of Reading, Language, Spelling, and Mathematics. The LEA's position in this case denying that Student had suffered any academic loss leads me to conclude that they are not capable of making an objective assessment of this loss. Therefore an independent assessor should be used.

Student should be provided the services of a tutor to work with him on any of these subjects if his assessed level of achievement in that subject is not up to his current Sixth Grade level. This

tutor should be available to him until Student's demonstrated performance in each of these four subject areas is commensurate with then current grade level standards.

To address the off task, disruptive, and aggressive behavior issues Student exhibits, which underlie the school exclusions found violative of FAPE herein, Parents shall be entitled to an IEE in the form of an FBA, as well as the services of that evaluator to create a BIP. All costs associated with providing the assessment, creating the BIP, and that person's attendance at the ultimate IEP meeting considering that functional behavior assessment, and resulting draft behavior plan, including travel expenses, shall be the responsibility of the LEA.

The loss of exposure to non-disabled peers occasioned by Student's exclusion from the classroom, and the violation of his rights to education in the LRE, can best be compensated by assuring prospectively that Student will be educated in the LRE from this time forward. Consequently, I will order that the Parent shall be authorized to locate, and obtain the services of, an consultant, expert in the area of including disabled children to the maximum extent possible, with their non-disabled peers (*i.e.*, an inclusion expert). Preference should be given to an expert with knowledge and experience assisting students with ADHD and Asperger's Syndrome, if such a person can be found. This expert shall be provided at LEA expense for a period of one year, and shall encompass costs occasioned by that expert's observance of Student, preparation of a report, and his/her attendance and/or participation in all IEP's and placement decisions over the course of the next 12 months.

This person's main objective will be to assist the LEA to find ways to implement the results of the new FBA and BIP in the LRE appropriate for Student.

When the new independent FBA and draft BIP are done, and the educational evaluations are complete, an IEP meeting should be held at the earliest practicable time. The independent evaluator

who performed the FBA and the independent inclusion expert should be in attendance in that meeting. (It is permissible for the creator of the FBA/draft BIP, and the inclusion expert to be a single person or agency). The BIP ultimately agreed upon should be included in the final IEP document.

The services of the tutor also should be included in that IEP, on a pre-determined scheduled basis convenient to the Student/Parents.

At the issuance of this decision, Student should be placed in school in accordance with the most recent completed IEP of October 1, 2009, until such time as a new IEP can be developed.

Nothing in this decision shall prevent the school's personnel from removing Student from his classrooms to a designated safe room, on an as-needed basis, as may be required to address any off task, disruptive, or aggressive behaviors which may be exhibited between issuance of this decision and the completion of a new IEP.

VI. DIRECTIVES FOR IMPLEMENTATION

(1) Student should immediately be assessed to determine his present achievement levels in the areas of Reading, Spelling, Language, and Mathematics. Parents shall be entitled to obtain an independent assessor at LEA expense. Such assessments should be scheduled so as to be completed within 60 days of this decision. The assessment should be specific enough to identify specific areas of academic weaknesses and strengths and quantify them.

(2) Services of a tutor shall be made available to the student, at the LEA's expense, until any identified deficiencies (defined as performance below then current grade level norms as defined by the West Virginia CSOs) are brought up to current grade level norms. Termination of tutorial services will be authorized when 12 months of

services have been provided, or when grade level commensurate performance on the four subject areas is demonstrated and documented, whichever occurs first. (Achievement of "mastery" on the Westest shall be considered grade level commensurate performance for Math and Reading).

The services should be provided on a regular schedule, either in the school day or after school hours, in compliance with the scheduling needs of the Parents. Parents should be required to identify times for services that are convenient for them but then services should be made available according to that schedule. Services may be offered over the Summer months in satisfaction of this Order. Total hours of tutoring provided should not exceed the hours of school which Student missed due to the denial of FAPE -- 266.25 hours.

(3) Parents shall be entitled to an Independent evaluation at LEA expense, in accord with all the provisions of 34 CFR § 300.502a in the form of an FBA and the subsequent preparation of a draft BIP. All costs of the assessment, preparation of the draft BIP and occasioned by the evaluator's participation in the IEP meeting to be held to consider the FBA and draft BIP, including travel expenses, shall be the responsibility of the LEA. The FBA should be performed and the report committed to writing within 60 days of this decision (*i.e.*, by May 17, 2010).

(4) The Parents shall be authorized to locate and retain the services of a consultant, expert in the areas of inclusion of disabled students to the maximum extent possible with their non-disabled peers (*i.e.*, an "inclusion expert"). Preference should be given to a person with knowledge concerning children with ADHD and children with Asberger's Syndrome, if such a person can be found. This expert's services shall be

at the LEA's expense for a period of one year, those services to include the expert's observation of the student, preparation of a report, and his/her participation in all IEP meetings over the course of the next 12 months. The main objective of this person will be to help the IEP Team to implement the results of the new FBA and BIP in the least restrictive environment appropriate for this student. Nothing in this directive should be construed to prevent the provisions of Directive 3 (re: the IEE for an FBA) and this directive from being fulfilled by the same person, if one person can be found who is expert in both areas. Any evaluation by this expert should be completed within 60 days of this decision.

(5) At the completion of the FBA and BIP under Directive 3, observations, and report, if any, from the inclusion expert in Directive 4, the educational assessments of Directive 1 (all of which should be completed on or before 60 days have elapsed following issuance of this decision), the LEA shall immediately give the Parents notice of an IEP meeting, which meeting shall be held to incorporate a BIP into Student's IEP, to include the services and schedule of the tutor, and to determine the least restrictive environment appropriate to Student's programming and personal needs. The FBA evaluator and the inclusion expert shall be included and participate in the IEP meeting, and all costs attendant thereto, including reasonable time charges and travel expenses, shall be borne by the LEA.

(6) Pending the completion of the new IEP provided for in Directive 5, Student shall be placed pursuant to the last completed IEP of October 1, 2009.

(7) Student's Parents are encouraged to cooperate with the LEA to make Student available for all assessments on a timely basis, and to ensure Student's regular attendance at school.

(8) Student should be required to attend school on the same calendar, and hours, as the general student population of his school and grade. Absences should be monitored and documented as for all other students in the County, and excused only in accordance with the established County policies and upon a showing of proper documentation.

(9) Nothing in this decision shall be taken to prohibit the Petitioner from again filing for Due Process in order to establish the appropriateness of the private placement he sought for Student, and the reasonableness of the costs associated with such a proposed private placement.

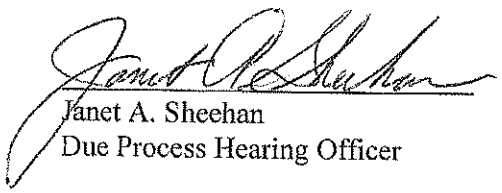
(10) Nothing in this decision should be interpreted to impede the parties from implementing the results of an IEP Meeting held on November 3, 2009.

(11) It is strongly suggested that Student's physician's be given the opportunity to participate in his IEP Meetings.

VII. APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in a hearing has the right to bring a civil action in any state court of competent jurisdiction within 120 calendar days of the date of the issuance of the Hearing Officer's written decision or in a district court of the United States.

SO ORDERED:



Janet A. Sheehan
Due Process Hearing Officer

ENTERED this 17th day of March, 2010.